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Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse

Report of the United Nations High Commissioner for Human Rights

Summary

The present report sets out guidance to improve accountability and access to remedy for victims of business-related human rights abuses, following the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and in response to the request by the Human Rights Council in its resolution 26/22.

The report comprises two parts. The first part provides an introduction to the guidance, including an explanation of its scope, potential usage and important cross-cutting contextual issues. This is followed, in the annex, by the guidance itself, which takes the form of "policy objectives" for domestic legal responses, supported by a series of elements intended to demonstrate the different ways in which States can work towards meeting those objectives in practice. The report is complemented by an addendum (A/HRC/32/19/Add.1), prepared as a companion to the guidance, providing additional explanation and context drawn from the two-year research process of OHCHR.

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I. Accountability and access to remedy: the urgent need for action

1. Business enterprises can be involved with human rights abuses in many different ways; because of the adverse impacts that business enterprises may cause or contribute to through their own activities, or by virtue of their business relationships. Ensuring the legal accountability of business enterprises and access to effective remedy for persons affected by such abuses is a vital part of a State's duty to protect against business-related human rights abuse.[2]

2. At present, accountability and remedy in such cases is often elusive. Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions.[3] Human rights impacts caused by business activities give rise to causes of action in many jurisdictions, yet private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of "adequate, effective and prompt reparation for harm suffered".[4]

3. State-based judicial mechanisms are not the only means of achieving accountability and access to remedy in cases of business-related human rights abuses. Other possibilities may include State-based non-judicial mechanisms[5] and non-State grievance mechanisms, such as operational level grievance mechanisms.[6] However, effective State-based judicial mechanisms are "at the core of ensuring access to remedy".[7]

4. Those seeking to use judicial mechanisms to obtain a remedy face many challenges. While those challenges vary from jurisdiction to jurisdiction, there are persistent problems common to many jurisdictions. These include fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement. Those problems have all contributed to a system of domestic law remedies that is "patchy, unpredictable, often ineffective and fragile".[8]

5. The challenges are exacerbated in cross-border cases.[9] While many domestic legal regimes focus primarily on within-territory business activities and impacts, the realities of global supply chains, cross-border trade, investment, communications and movement of people are placing new demands on domestic legal regimes and those responsible for enforcing them.

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[1] See the report by J. Zerk entitled "Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies", prepared for OHCHR (February 2014), available from www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, pp. 16-30.

[2] See principle 25 and commentary of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31).

[3] Note, however, the distinction between corporate sanctions and sanctions on individuals (see A/HRC/32/19/Add.1, para. 4).

[4] See the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex), article I.2 (b) and VII.

[5] See principle 27 and commentary of the Guiding Principles.

[6] Ibid., principle 28 and commentary.

[7] Ibid., principle 26 and commentary.

[8] See "Corporate liability for gross human rights abuses" (note 2 above), p. 7.

[9] For a definition of "cross-border" cases, see A/HRC/32/19/Add.1, box 3.

6. The experiences of those seeking remedy suggest that there remain serious deficiencies in the implementation by many States of their international obligations with respect to access to remedy. The right to an effective remedy for harm is a core tenet of international human rights law. The obligations of States with respect to this right have been reflected in the Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework[10] in terms of a "State duty to protect" against business-related human rights abuses, of which providing access to an effective remedy is an integral part.[11]

7. Rectifying these deficiencies — which, in many cases, are rooted in wider social, economic and legal challenges — will not be straightforward. It will require concerted and multifaceted efforts from all States, encompassing actions relating to law reform and legal development, improvements to the functioning of judicial mechanisms, law enforcement, policy development and closer international cooperation. However, this is essential work towards realizing the imperatives of accountability and remedy for business-related human rights abuses.

II. Overview

A. Background

8. Of the three pillars of the Guiding Principles,[12] endorsed in 2011 by the Human Rights Council,[13] the "Access to remedy" pillar[14] has arguably received the least attention. In 2013, to help redress this imbalance, OHCHR, as part of its mandate to advance the protection and promotion of human rights globally, initiated a process aimed at helping States strengthen their implementation of this third pillar, particularly in cases of severe business-related human rights abuses.

9. In its resolution 26/22, the Human Rights Council requested the Commissioner to continue work on improving access to remedy and to report back to the Council.[15]

10. In November 2014, and pursuant to that mandate from the Human Rights Council, OHCHR launched the Accountability and Remedy Project.[16] An interim progress report was submitted to the Council in June 2015.[17]

B. Scope

11. The Accountability and Remedy Project focused on substantive legal and practical issues that have an impact upon the effectiveness of judicial mechanisms in achieving corporate accountability and access to remedy in cases of business-related human rights

[10] See A/HRC/17/31.
[11] See note 2, above.
[12] See A/HRC/17/31. The three "pillars" of the Guiding Principles are the "State duty to protect human rights", the "Corporate responsibility to respect human rights" and "Access to remedy".
[13] See Human Rights Council resolution 17/4.
[14] See principles 25 to 31 of the Guiding Principles.
[15] See Human Rights Council resolution 26/22, para. 7.
[16] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.
[17] A/HRC/29/39.

abuses, with a particular emphasis on cases of severe abuses.[18] The project focused on six areas: (a) domestic law tests for corporate legal liability; (b) the roles and responsibilities of interested States in cross-border cases; (c) overcoming financial obstacles to legal claims; (d) criminal law sanctions; (e) civil law remedies; and (f) domestic prosecution bodies. Those six themes were selected as areas that require urgent attention and where developments were capable of delivering improvements to accountability and remedy in the short to medium term.

12. While it was necessary to limit the scope to these six priority areas due to time and resource constraints, it is recognized that there are other important aspects of access to remedy which the project has not covered. These include strengthening State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms as important complements to judicial remedies; individual liability of corporate officers and directors; reforms to rules of court procedure; measures to ensure protection of victims and their representatives from intimidation and threats of reprisals; and wider political, social and economic challenges to the rule of law, including corruption, lack of judicial independence and lack of capacity in many domestic legal systems.[19]

C. Methodology

13. To better understand the challenges that exist at the domestic level and the initiatives likely to be most effective given the diversity of legal structures, traditions and approaches around the world,[20] OHCHR gathered empirical information from a wide range of jurisdictions on the functioning of domestic legal systems and relevant regimes. This was done through a global online consultation, country-specific reports, reviews of existing research, research projects relating to cross-border and international cooperation, interviews with prosecutors, multi-stakeholder consultations, two workshops with State representatives, engagements with business, civil society and national human rights institutions and online consultative processes at key milestones in the project.[21] Through its collaboration with the Working Group on the issue of human rights and transnational corporations and other business enterprises, OHCHR also held consultations during the Forum on Business and Human Rights and the Africa and Asia regional forums on business and human rights. All key documents and milestones of the project were communicated directly to States and made available to other stakeholders through relevant platforms and information-sharing channels.[22] Regular briefings on the project were held for delegates of the Human Rights Council.

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[18] The emphasis on severe abuses was determined following practical and strategic considerations, including the need for comparability of data on existing State practices, but does not suggest that other categories of harm do not also require a domestic legal response. Business enterprises can have an impact upon virtually the entire spectrum of internationally recognized human rights, and that impact can range in type, nature and severity. The guidance is not limited to "severe" human rights abuses. However, where business involvement in severe human rights abuses may demand a particular response, for example, in the case of specially targeted legal regimes, this has been highlighted in the guidance. For more information about the choice of scope, see www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

[19] See principle 26 and commentary of the Guiding Principles, and para. 15 below.

[20] See A/HRC/32/19/Add.1, para. 5.

[21] See note 16 above.

[22] See business-humanrights.org/en/ohchr-accountability-and-remedy-project.

D. Structure of the guidance

14. The structure chosen for the guidance, on the basis of a series of policy objectives and elements to demonstrate the different ways objectives can be achieved, is deliberately flexible. There are many differences among jurisdictions in terms of legal structures, cultures, traditions and resources, all of which have implications for future law reform. To ensure global relevance and applicability, the guidance is designed to be readily adaptable to a range of different legal systems and contexts and, at the same time, practical, forward-looking and reflective of international standards on access to remedy.

15. The guidance should not be regarded as a finite list of possible solutions to the problems identified in the course of the work of OHCHR. There may be other ways of achieving the underlying goal of improving implementation by States of the Guiding Principles. Nor should the guidance be read as an exhaustive list of the actions to be taken by States to implement the "Access to remedy" pillar. Deficiencies in domestic legal systems with respect to accountability and access to remedy may have their roots in wider challenges, including poverty, lack of capacity and lack of respect for the rule of law, which may require more fundamental and wide-ranging reforms.

16. Nevertheless, the guidance will be a significant resource for States seeking to improve the effectiveness of their domestic legal responses to business and human rights challenges and, beyond this, as a possible platform for future dialogue, cross-fertilization of ideas, innovation and progress.

17. In recognition of the distinct features of public and private remedial mechanisms, the guidance has been divided into two parts: one relating to the enforcement of public law offences and one relating to private law claims by affected individuals and communities. Although domestic legal regimes do not necessarily fall neatly into one or other category, and although there are barriers common to both methods of enforcement, there are sufficient differences between the two to warrant separate treatment in the guidance. The addendum to the present document provides further explanation and context in relation to the different components of the guidance. In addition, a set of generalized illustrative examples of State practice, demonstrating the ways that States can implement different aspects of the guidance, are available from the website of OHCHR.[23]

18. Figures 1 and 2 below set out in graphic form an overview of the different components of the guidance, the relationships between those different components and their implications for accountability and access to remedy.

[23] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

Figure 1

Enforcement of public law offences: implications of key features of domestic law regimes for accountability and access to remedy (Part I)

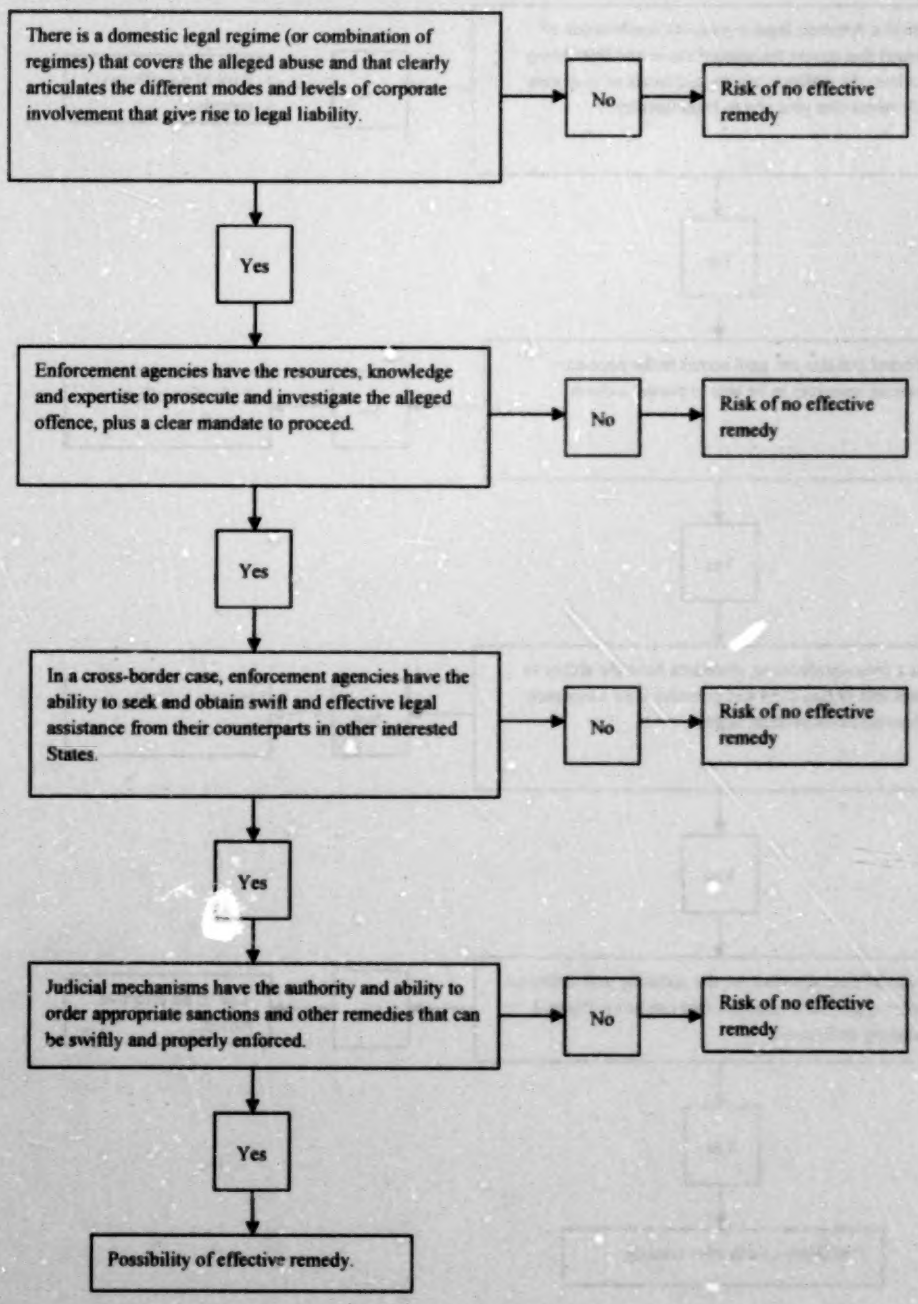
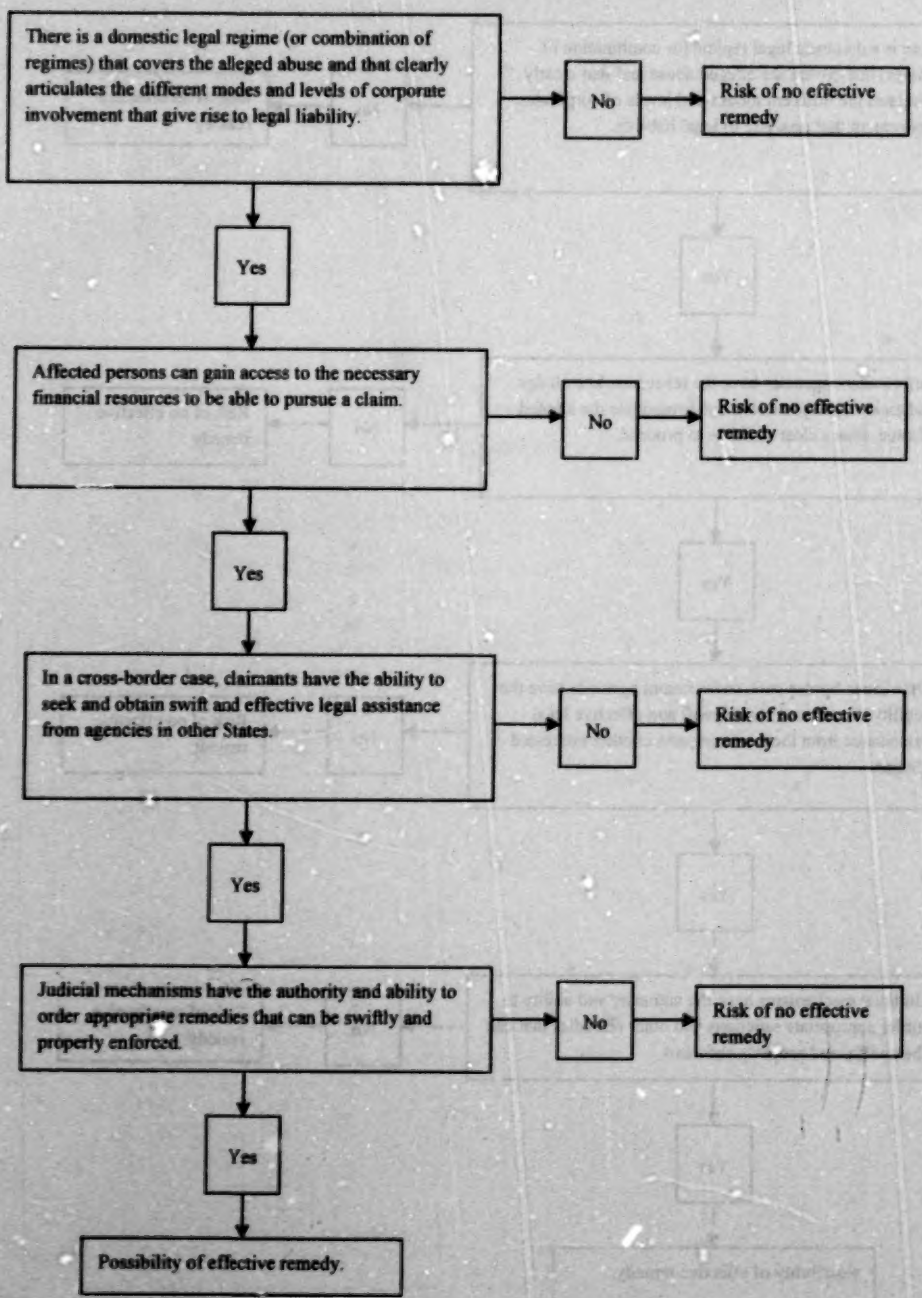

There is a domestic legal regime (or combination of regimes) that covers the alleged abuse and that clearly articulates the different modes and levels of corporate involvement that give rise to legal liability.
No
Risk of no effective remedy
Yes
Enforcement agencies have the resources, knowledge and expertise to prosecute and investigate the alleged offence, plus a clear mandate to proceed.
No
Risk of no effective remedy
Yes
In a cross-border case, enforcement agencies have the ability to seek and obtain swift and effective legal assistance from their counterparts in other interested States.
No
Risk of no effective remedy
Yes
Judicial mechanisms have the authority and ability to order appropriate sanctions and other remedies that can be swiftly and properly enforced.
No
Risk of no effective remedy
Yes
Possibility of effective remedy.

Figure 2

Private law claims by affected individuals and communities: implications of key features of domestic law regimes for accountability and access to remedy (Part II)


There is a domestic legal regime (or combination of regimes) that covers the alleged abuse and that clearly articulates the different modes and levels of corporate involvement that give rise to legal liability.
No
Risk of no effective remedy
Yes
Affected persons can gain access to the necessary financial resources to be able to pursue a claim.
No
Risk of no effective remedy
Yes
In a cross-border case, claimants have the ability to seek and obtain swift and effective legal assistance from agencies in other States.
No
Risk of no effective remedy
Yes
Judicial mechanisms have the authority and ability to order appropriate remedies that can be swiftly and properly enforced.
No
Risk of no effective remedy
Yes
Possibility of effective remedy.

E. Target audience

19. The guidance is addressed primarily to State agencies and judicial bodies concerned with the development, administration and enforcement of domestic legal regimes that regulate the respect by business enterprises of human rights. States can implement the guidance in a variety of ways, for example, through a domestic legal review process, as part of national action plans on business and human rights, as part of strategies to improve access to justice or other processes as may be suitable to the particular domestic context. The guidance will also be relevant to the work of policymakers and practitioners, including those involved in legislative drafting, prosecutors and other law enforcement officials, and national human rights institutions. The guidance may also help to inform the ongoing work of international bodies with mandates relevant to business and human rights, including human rights treaty bodies. Various elements of the guidance can be used to guide business enterprises and may be drawn upon by other stakeholders, such as civil society organizations and trade unions.

III. Three cross-cutting issues

20. The addendum provides further context and explanation for each component of the guidance. However, the following three issues have particular implications for corporate accountability and access to remedy in cases of business-related human rights abuses and are important to understand for effective implementation of the guidance.

A. Structural and managerial complexity of business enterprises

21. Business enterprises can take many legal and structural forms. They may be single corporate entities (or "companies") or a group of companies working together through relationships on the basis of shared ownership, or contract, or both. The company law doctrine of "separate corporate personality" is recognized in most, if not all, jurisdictions. Under this doctrine, each company, as a separately incorporated legal entity, is treated as having a separate existence from its owners and managers. Consequently, a company (a parent company) that owns shares in another company (a subsidiary) will not generally be held legally responsible for acts, omissions or liabilities of that subsidiary merely on the basis of the shareholding.

22. This means that legal liability for the adverse human rights impacts of a subsidiary's activities may not extend beyond the subsidiary itself, unless the liability of the parent company can be established on some other basis (e.g., because of the parent company's own negligence in the way the subsidiary was managed or because of some specific legislative provision).[24] In many jurisdictions, however, the law relating to parent company liability in cases of business-related human rights abuses is in the early stages of development, creating an uncertain basis for legal action against parent companies (and other constituent members of business enterprises). On the other hand, there will be cases in which a claim against a parent company may be the only way of securing an effective remedy for the human rights impacts of a subsidiary's activities, such as where the subsidiary has been dissolved, is insolvent or has insufficient resources to meet a legal claim for damages.

[24] See A/HRC/32/19.Add.1, paras. 6-23 and 42-56.

23. The legal uncertainty in many jurisdictions surrounding the extent to which parent companies (and other constituent companies within a business enterprise) have legal responsibilities under domestic law regimes to identify, prevent and mitigate human rights abuses connected with that business enterprise's operations is not only a barrier to remedy itself, but also gives rise to further barriers, including by adding to legal costs and creating delays. For those reasons, the guidance relating to both public law offences and private law claims opens with a set of suggestions relating to the development of legal regimes that respond more readily to the practicalities of organization and management of business enterprises,[25] and which take into account the particular challenges arising from complex global supply chains.[26]

B. Challenges particular to cross-border cases and the importance of international cooperation

24. Cross-border cases[27] pose particular challenges that can undermine efforts to ensure accountability and access to remedy. The prevailing lack of clarity across jurisdictions about the roles and responsibilities of different interested States in cross-border cases create a significant risk that no action will be taken, leaving victims with no prospect of remedy. Against that background, various human rights treaty bodies have recommended that home States take steps to prevent business-related human rights abuses by business enterprises domiciled in their jurisdiction.[28]

25. The extent of international cooperation in cross-border cases has a crucial bearing on accountability and access to remedy in practice. States have entered into a range of bilateral and multilateral arrangements to support, facilitate and enable international cooperation with respect to legal assistance and enforcement of judgments in cross-border cases, including cases concerning business-related human rights abuses.[29] Some of these include provisions concerning the desired or required use of jurisdiction in cross-border cases.[30]

26. Some international instruments relevant to cross-border human rights cases also include provisions designed to facilitate greater cross-border exchange of information between domestic law enforcement and judicial bodies, and provisions aimed at improving regulatory effectiveness more generally, reflecting a recognition by participating States of the benefits of greater alignment of regulatory and investigative standards and capacities as a way of strengthening and deepening cooperative responses to global regulatory challenges.[31]

27. Regardless of whether formal international legal arrangements are in place, State agencies can experience a range of practical challenges that can undermine effective cooperation, including a lack of information about how to make a request to agencies in other States, a lack of opportunities for cross-border consultation and coordination, differences of approach regarding issues of privacy and the protection of sensitive information, a lack of resources needed to process requests in a timely manner and a lack of awareness of investigative standards in other States.

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[25] See annex, paras. 1.5 and 12.3.
[26] Ibid., paras. 1.6 and 12.4.
[27] See note 9 above.
[28] See A/HRC/32/19.Add.1, para. 33.
[29] Ibid, para. 36.
[30] Ibid., para. 34.
[31] Ibid., para. 36.

28. For those reasons, the guidance includes a series of recommendations designed to improve the effectiveness of cross-border cooperation between relevant State agencies and judicial bodies, tailored to the contexts of both public law enforcement[32] and private law claims.[33]

C. The need for policy coherence

29. Legal and policy reforms will often have more impact as a package of measures than on their own. Some of the elements in the guidance will depend for their effectiveness on other supporting measures. Awareness of this interconnectedness is needed to avoid the piecemeal development of legal responses for business and human rights issues that has thus far hampered the effectiveness of domestic legal regimes in many jurisdictions. States should strive for both "vertical" and "horizontal" policy coherence in the development of laws and policies that have implications for business and human rights.[34]

30. Weak, incoherent or inconsistent regulation not only undermines the effectiveness of legal regimes, but also creates additional barriers to accountability by adding to the costs and complexities of enforcement and creates legal uncertainties and compliance dilemmas for companies. There is room for improvement in the domestic law responses of every State. To support greater policy coherence, the identification of areas for improvement in domestic legal responses may require a formal legal review. To assist States in that regard, OHCHR has developed a model terms of reference for a formal legal review of the effectiveness of domestic legal regimes that may be adapted to respond to local challenges and needs.[35]

IV. Recommendations

31. **Member States should:**

(a) **As part of their implementation of the "Access to remedy" pillar of the Guiding Principles, consider undertaking a review of the coverage and effectiveness of their domestic law regimes that regulate the respect by business enterprises of human rights, using the guidance in the annex to the present report as a starting point, with a view to (i) developing policies and legal reforms that respond more effectively to the practicalities of organization and management of business enterprises and which take into account the particular challenges arising from complex global supply chains; and (ii) improving the effectiveness of State-based judicial mechanisms as a means of delivering corporate accountability and remedy in cases of business-related human rights abuses;**

(b) **Develop a comprehensive strategy for implementation of the guidance in a manner that responds appropriately to local legal structures, challenges and needs, for instance, as part of national action plans on business and human rights, and/or as part of strategies to improve access to justice generally;**

(c) **Take steps, using the guidance, to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies, with respect to both public and private law enforcement of domestic legal regimes.**

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[32] See annex, paras. 9.1-9.7 and 10.1.

[33] Ibid., paras. 17.1-17.5 and 18.1-18.2.

[34] See principle 8 and commentary of the Guiding Principles.

[35] See A/HRC/32/19.Add.1, para. 5.

Annex

Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse*

I. Enforcement of public law offences

Principles for assessing corporate legal liability

Policy objective 1: Domestic public law regimes that are relevant to the respect by business enterprises of human rights ("domestic public law regimes") are sufficiently detailed and robust to ensure that there is both effective deterrence from and effective remedy in the event of business-related human rights abuses.

1.1 Domestic public law regimes (a) provide the necessary coverage with respect to business-related human rights abuses; (b) adopt legislative, regulatory and policy measures appropriate to the type, nature and severity of different business-related human rights impacts; and (c) are clear as to whether, and the extent to which, they impose legal obligations on companies.

1.2 Domestic public law regimes make appropriate provisions for corporate criminal liability, or its functional equivalent, in cases where business-related human rights impacts are severe.

1.3 Corporate legal liability under domestic public law regimes does not depend, in law or in practice, on a prior successful conviction of an individual offender.

1.4 Domestic public law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.

1.5 Domestic public law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take appropriate account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

1.6 Domestic public law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention and mitigation of any human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies practices or operations.

1.7 In the distribution of evidential burdens of proof between an enforcement agency and a defendant company, domestic public law regimes strike an appropriate balance between considerations of access to remedy and fairness to all parties.

1.8 Domestic public law regimes are clear as to their geographic scope.

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* See A/HRC/32/19.Add.1. See also www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

1.9 The State regularly reviews[b] whether its domestic public law regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and the State's obligations under international human rights treaties and takes the necessary legislative and/or policy steps to correct any deficiencies in coverage or approach.

Policy objective 2: Domestic public law regimes are sufficiently robust to ensure that there is both effective deterrence from and remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.

2.1 Domestic public law regimes (a) communicate clearly the different modes and degrees of contribution to harms perpetrated by a third party that will give rise to secondary legal liability; and (b) are clear about the extent to which the principles for assessing secondary liability are applicable to companies.

2.2 Domestic public law regimes are clear as to the principles used to attribute knowledge, intentions, actions and omissions to a company for the purposes of assessing corporate legal liability on the basis of theories of secondary liability.

2.3 Domestic public law regimes treat offences based on theories of secondary liability (a) with the same level of seriousness as the relevant primary offence; and (b) as distinct offences, conceptually and procedurally separate from any primary offences committed by the main perpetrator. As such, a finding of secondary liability is not contingent, in law or in practice, on any judicial determination of liability on the part of the main perpetrator.

Policy objective 3: The principles for assessing corporate liability under domestic public law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

3.1 Domestic public law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

3.2 Domestic public law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

3.3 Domestic public law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

3.4 Enforcement agencies and judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Supporting the work of State agencies responsible for investigation and enforcement

Policy objective 4: State agencies responsible for investigating allegations of business-related human rights abuses and enforcement of domestic legal regimes ("enforcement agencies") have a clear mandate and political support.

4.1 The State effectively supports its enforcement agencies in protecting against business-related human rights abuses.

[b] See A/HRC/32/19/Add.1, para. 5.

4.2 The State takes the steps necessary to ensure that its enforcement agencies have effective working relationships and communication links and are able to coordinate their activities effectively with other domestic bodies that regulate the respect by business enterprises of human rights, including agencies responsible for the regulation of labour, consumer and environmental standards and agencies responsible for the enforcement of laws relating to bribery and corruption.

4.3 The use of discretion on the part of enforcement agencies as to whether to investigate and/or take enforcement action ("enforcement discretion") is exercised in accordance with a comprehensive enforcement policy that: (a) clearly sets out how decisions are made regarding whether to investigate or commence enforcement action and the factors that will be taken into account; (b) has been developed wherever possible following appropriate public consultation; and (c) is made available to the public.

4.4 Enforcement agencies ensure that there is policy coherence between: (a) policies and procedures that set performance targets for their personnel; (b) financial and other performance incentives for such personnel; and (c) policies relating to the use of enforcement discretion.

Policy objective 5: There is transparency and accountability with respect to the use of enforcement discretion.

5.1 Decisions by enforcement agencies not to investigate or take enforcement action are, to the extent possible, subject to formal challenge through a fair and transparent process.

5.2 Enforcement agencies take proactive steps to ensure that, in the event where a request to investigate or take enforcement action has been declined, the complainants in the case are informed (a) of any rights they may have formally to challenge such a decision; and (b) of the procedures that will apply in the event the complainants choose to exercise such rights.

Policy objective 6: Enforcement agencies have access to the necessary resources, training and expertise.

6.1 Enforcement agencies have access to adequate resources to investigate and take enforcement action with respect to allegations of business-related human rights abuses.

6.2 The State has established specialist units, within enforcement agencies or pursuant to applicable legal regimes, that are responsible for the detection, investigation and prosecution of cases of business involvement in severe human rights abuses, and that have access to expertise relating to the investigation of serious offences involving corporate entities, including in cross-border contexts.[6]

6.3 The State ensures adequate training for enforcement agency employees in the legal and technical aspects of investigating allegations of severe business-related human rights abuses.

Policy objective 7: Enforcement agencies carry out their work in such a way as to ensure the safety of victims, other affected persons, human rights defenders, witnesses, whistle-blowers and their legal representatives ("relevant individuals and groups") and is sensitive to the particular needs of individuals and groups at heightened risk of vulnerability or marginalization.

7.1 Systems are in place to ensure that enforcement agency employees take appropriate steps to ensure the protection of relevant individuals and groups from the risk of

[6] See paras. 9.1-9.7 and 10.1 below.

intimidation and reprisals, and compliance with those procedures is properly monitored and evaluated.

7.2 Systems are in place to ensure that enforcement agency employees are aware of and take proper account of issues relating to gender, vulnerability and/or marginalization in their dealings with relevant individuals and groups.

Policy objective 8: Enforcement agencies are able to take decisions independently in accordance with publicly available policies, without the risk of political interference in their operations, and to high ethical standards.

8.1 Enforcement agencies have the ability and independence, in law and in practice, to commence an investigation into and take enforcement action with respect to allegations of business-related human rights abuses at their own initiative and without the need for a formal complaint by or on behalf of an affected person or group.

8.2 Employees of enforcement agencies are held to high standards of personal and professional conduct and laws, and standards relating to legal ethics, conflicts of interest, bribery and corruption are rigorously enforced.

Cooperation in cross-border cases

Policy objective 9: Enforcement agencies and judicial bodies can readily and rapidly seek legal assistance and respond to requests from their counterparts in other States with respect to the detection, investigation, prosecution and enforcement of cross-border cases concerning business involvement in severe human rights abuses.

9.1 The State sets out a clear policy expectation that enforcement agencies and judicial bodies will be appropriately responsive to requests from the relevant agencies of other States in cross-border cases.

9.2 The State ensures that appropriate bilateral and multilateral arrangements are in place to enable enforcement agencies and judicial bodies to request mutual legal assistance from relevant counterparts in other States in cross-border cases.

9.3 The State enables its enforcement agencies, where appropriate, to carry out cross-border investigations and prosecutions through joint investigation teams or other similar arrangements.

9.4 The State ensures that its enforcement agencies and judicial bodies have access to the necessary information, support, training and resources to enable personnel to make the best use of arrangements with other States for cooperation in cross-border cases.

9.5 The State is actively involved with relevant bilateral and multilateral initiatives aimed at improving the ease with which and speed at which (a) requests for mutual legal assistance can be made and responded to; and (b) information can be exchanged between enforcement agencies and/or judicial bodies in cross-border cases, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

9.6 Enforcement agencies and judicial bodies support and encourage the involvement of their personnel in relevant bilateral and multilateral initiatives and networks aimed at (a) facilitating contact and exchange of know-how between counterparts in other States; and (b) promoting awareness of different opportunities and options for international cooperation and the provision of legal assistance in cross-border cases.

9.7 The State keeps under review the scope, adequacy and appropriateness of its arrangements for mutual legal assistance with other States in the light of relevant factors,

such as patterns of inward and outward foreign direct investment, and takes relevant steps to add to or improve such arrangements as necessary.

Policy objective 10: The State works through relevant bilateral and multilateral forums to strengthen methods, systems and legal regimes relevant to cross-border cases concerning business involvement in human rights abuses.

10.1 The State actively participates in bilateral, regional and multilateral initiatives aimed at strengthening domestic legal responses to cross-border human rights challenges with a business connection.

Public law sanctions and other remedies

Policy objective 11: Sanctions and other remedies that may be imposed following a determination of corporate legal liability in cases of business-related human rights abuse offer the prospect of an effective remedy for the relevant loss and/or harm.

11.1 Judicial bodies have the authority and ability, in law and in practice, to impose a range of sanctions following a finding of corporate legal liability in cases of business-related human rights abuse, which may include financial penalties and/or non-financial remedies, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, satisfaction (e.g. public apologies) and guarantees of non-repetition (e.g. cancellation of operating licenses, mandated compliance programmes, education and training).

11.2 In each case, the sanctions imposed on companies: (a) are proportional to the gravity of the abuse and the harm suffered; (b) reflect the degree of culpability of the relevant company (e.g. as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company had responded adequately to warnings and other relevant factors); (c) are designed in such a way as to minimize the risks of repetition or continuation of the abuse and/or harm; (d) are sufficiently dissuasive to be a credible deterrent to that company, and others, from engaging in the prohibited behaviour; and (e) take into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

11.3 To the extent possible, victims are appropriately consulted: (a) with respect to the design and implementation of sanctions and other remedies; (b) with respect to any decision to enter into a deferred prosecution agreement, and the terms of any such agreement; and (c) with respect to the terms of any settlement. Such consultation takes into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

11.4 State agencies and/or judicial bodies monitor the implementation of sanctions and other remedies and ensure that there is an effective mechanism by which interested persons can report and/or raise a complaint regarding and/or seek remedial action with respect to any non-implementation of such sanctions and/or other remedies.

11.5 The domestic legal system does not permit the tax deductibility of amounts paid as financial penalties following a determination of corporate legal liability for business-related human rights abuses.

II. Private law claims by affected individuals and communities

Principles for assessing corporate legal liability

Policy objective 12: Domestic private law regimes that regulate the respect by business enterprises of human rights ("domestic private law regimes") are sufficiently robust to ensure that there is both proper deterrence from and effective remedy in the event of business-related human rights abuses.

12.1 Domestic private law regimes: (a) provide the necessary coverage with respect to business-related human rights abuses; (b) ensure that there are causes of action for business-related human rights abuses corresponding appropriately to the varying degrees of severity and the different kinds of harm that can result from such abuse; and (c) are clear as to whether and the extent to which they impose legal obligations on companies.

12.2 Domestic private law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.

12.3 Domestic private law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take proper account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

12.4 Domestic private law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention and mitigation of human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies, practices or operations.

12.5 In the distribution of evidential burdens of proof between the claimant and the defendant company, domestic private law regimes strike an appropriate balance between considerations of access to remedy and fairness to all parties.

12.6 Corporate legal liability under domestic private law regimes is not contingent, in law or in practice, upon a prior finding of corporate legal liability under any domestic public law regime (e.g. a finding of corporate criminal liability or its functional equivalent).

12.7 Affected persons are not prevented, in law or in practice, from bringing a claim because of an ongoing public law (e.g. criminal) investigation into the same set of facts as the prospective private law claim.

12.8 Domestic private law regimes are clear as to their geographic scope.

12.9 The State regularly reviews[4] whether its domestic private law regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and the State's obligations under international human rights treaties, and takes the necessary legislative and/or policy steps to correct any deficiencies in coverage or approach.

[4] See A/HRC/32/19.Add.1, para. 5, box 1.

Policy objective 13: Private law regimes are sufficiently robust to ensure that there is both effective deterrence from and effective remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.

13.1 Domestic private law regimes (a) communicate clearly the different modes and degrees of contribution to the harms perpetrated by a third party that will give rise to secondary legal liability; and (b) are clear as to the extent to which the principles for assessing secondary liability are applicable to companies.

13.2 Domestic private law regimes are clear as to the principles used to attribute knowledge, intentions, actions and omissions to a company for the purposes of assessing corporate legal liability on the basis of theories of secondary liability.

13.3 Domestic private law regimes treat causes of action based on theories of secondary liability as distinct causes of action, conceptually and procedurally separate from any breaches of law committed by the primary wrongdoer, and such secondary liability is not contingent, in law or in practice, on any judicial finding of liability on the part of the primary wrongdoer.

Policy objective 14: The principles for assessing corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

14.1 Domestic private law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

14.2 Domestic private law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

14.3 Domestic private law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

14.4 Judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Overcoming financial obstacles to private law claims

Policy objective 15: Claimants in cases arising from business-related human rights abuses have access to diversified sources of litigation funding.

15.1 States prioritize the provision of State funding to claimants who are able to show financial hardship, and ensure that such funding is available on transparent and non-discriminatory terms, taking into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

15.2 The domestic legal system permits and encourages pro bono legal services.

15.3 Rules of civil procedure provide for the possibility of collective redress mechanisms in cases arising from business-related human rights abuses, the criteria for which are clearly expressed and consistently applied.

15.4 The domestic legal system permits a range of private funding arrangements, such as funding by third party litigation funders, firms of solicitors (e.g. pursuant to contingency fee and/or "success fee" arrangements) and providers of litigation insurance.

15.5 Providers of private funding arrangements are subject to appropriate regulation to ensure proper standards of service and to guard against abuse and conflicts of interest.

15.6 Potential claimants have access to well-publicized and reliable sources of advice on their options with respect to litigation funding and resourcing, in languages and formats that are both accessible and understandable.

Policy objective 16: Costs associated with bringing private law claims in cases arising from business-related human rights abuses (e.g. lawyer's fees and court fees) are reduced, including through better case management and other efficiency measures.

16.1 Court fees (e.g. initial filing fees, fees for obtaining and copying documents, etc.) are reasonable and proportionate, with the likelihood of waivers for claimants showing financial hardship and in cases where there is a public interest in the litigation taking place.

16.2 Court procedures include readily identifiable, realistic and affordable opportunities for early mediation and settlement.

16.3 Systems exist for the identification of and transparency and judicial accountability with respect to court delays.

16.4 Rules on the allocation of court and legal costs at the conclusion of proceedings are designed to encourage reasonableness on the part of litigants, efficient use of legal and other resources in the pursuit of any claim or defence to a claim and, as far as possible, the swift conclusion of legal claims.

16.5 Rules on security for costs strike a proper balance between the needs of a defendant with respect to the management of financial risks associated with litigation and considerations of access to remedy for claimants.

16.6 Domestic law courts make appropriate use of technologies, including information and communications technologies, to operate in an efficient and cost-effective manner.

16.7 There is the possibility of civil enforcement of legal standards by regulators (i.e. acting on behalf of affected individuals or groups) in appropriate cases.

Cooperation in cross-border cases

Policy objective 17: Claimants in cases arising from business-related human rights abuses are readily and rapidly able to seek legal assistance from relevant State agencies and judicial bodies in other States for the purpose of gathering evidence from foreign individual, corporate and regulatory sources for use in judicial proceedings.

17.1 The State sets out a clear policy expectation that its judicial bodies and other relevant State agencies will be appropriately responsive to requests for legal assistance made for the purposes of obtaining evidence for use in judicial proceedings arising from business-related human rights abuses.

17.2 The State ensures that appropriate bilateral and multilateral agreements are in place to enable its judicial bodies and other relevant State agencies to request legal assistance from relevant counterparts in other States for the purposes of obtaining evidence for use in judicial proceedings arising from business-related human rights abuse.

17.3 The State ensures that its judicial bodies and other relevant State agencies have access to the necessary information, support, training and resources to enable personnel to make the best use of arrangements with other States for cooperation in private law cases.

17.4 The State is actively involved with bilateral and multilateral initiatives aimed at improving the ease with which and speed at which (a) requests for mutual legal assistance

can be made and responded to; and (b) information can be exchanged between judicial bodies and other relevant State agencies in private law cases, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

17.5 Judicial bodies and other relevant State agencies support and encourage the involvement of their personnel in relevant bilateral and multilateral initiatives and networks aimed at (a) facilitating contact and exchange of know-how between their personnel and their counterparts in other States; and (b) promoting awareness of different opportunities and options for international cooperation and the provision of legal assistance in private law cases.

Policy objective 18: The State actively engages in relevant forums and initiatives to seek to improve access to information for claimants and their legal representatives in cross-border cases arising from or connected with business-related human rights abuses.

18.1 The State actively engages in bilateral, regional and multilateral initiatives aimed at improving the ease with which and speed at which information can be exchanged between claimants and their legal representatives and the relevant State agencies of other States in cross-border cases.

18.2 The State engages in bilateral, regional and multilateral initiatives that relate to cross-border access to information regarding the human rights-related risks and impacts of different business activities, and that aim at achieving greater alignment between different domestic legal regimes with respect to issues such as data protection, protection of victims and their legal representatives, protection of whistle-blowers and legitimate requirements of commercial confidentiality.

Private law remedies

Policy objective 19: Private law remedies consequent upon a determination of corporate legal liability offer the prospect of an effective remedy for the relevant abuse and/or harm.

19.1 Judicial bodies have the authority and ability, in law and in practice, to award a range of remedies in private law cases arising from business-related human rights abuses that may include monetary damages and/or non-monetary remedial measures, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, satisfaction (e.g. public apologies) and guarantees of non-repetition (e.g. mandated compliance programmes, education and training).

19.2 In each case, the private law remedies awarded to claimants: (a) are proportional and appropriate to the gravity of the abuse and the extent and nature of the loss and/or harm suffered; (b) may, to the extent permitted by the relevant domestic legal system, reflect the degree of culpability of the defendant company (e.g. as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company responded adequately to warnings and other relevant factors); (c) are designed in such a way as to minimize the risks of repetition or continuation of the harm; and (d) take account of issues of gender and the needs of individuals or groups at heightened risk of vulnerability or marginalization.

19.3 Claimants are consulted with respect to the design and implementation of private law remedies and with respect to the terms of any settlement. Such consultation takes

account of gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization.

19.4 Judicial bodies and/or relevant State agencies monitor a company's implementation of private law remedies in an appropriate fashion and ensure that there is an effective mechanism by which interested persons can report and/or raise a complaint regarding and/or seek remedial action with respect to any non-implementation of such remedies.

19.5 The domestic legal system does not permit the tax deductibility of amounts paid as monetary damages following a determination of corporate legal liability in cases arising from business-related human rights abuses.

19.6 The domestic legal system ensures, through appropriate regulation, guidance or professional standards, that monetary damages are distributed among members of affected groups of claimants in a fair, transparent and non-discriminatory way, taking into account gender issues and the needs of individuals or groups at heightened risk or vulnerability or marginalization.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance*

Note by the Secretariat

The present document accompanies the report of the United Nations High Commissioner for Human Rights to the Human Rights Council.

It has been prepared as a companion to the guidance presented in the annex to the report, on improving accountability and access to remedy for victims of business-related human rights abuse. It provides additional explanations and context to enhance understanding and to aid implementation of the guidance.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance**

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** Circulated in English, French and Spanish only.

I. Introduction

1. The present document serves as a companion to the guidance presented in the annex to the report of the High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuses (A/HRC/32/19).

2. The guidance presented in that report and the present addendum are complemented by a compilation of illustrative examples of State practices, gathered over the course of the research and consultations conducted by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Those examples, made available online, show how the guidance can be implemented in practice.[1]

A. Focus on the role of State-based judicial mechanisms

3. The guidance focuses on corporate accountability and access to remedy through State-based judicial mechanisms. The extent to which there is access to remedy in any jurisdiction, including through non-judicial remedial mechanisms, depends ultimately on the existence of effective judicial mechanisms.[2] The presence of effective judicial mechanisms can also enhance the effectiveness of non-judicial remedial mechanisms by providing incentives to parties to participate and a means of enforcement of outcomes. Furthermore, there will be cases, especially where the human rights impacts are severe, where reference to non-judicial remedial mechanisms may not be appropriate or in keeping with State duties to protect against business-related human rights abuses. However, the guidance recognizes the important role of State-based non-judicial mechanisms, for instance, as a way of reducing the financial obstacles to access to remedy.[3]

4. The guidance focuses on the legal liability of companies as opposed to the individual liability of officers and employees. While individual legal accountability is important as an appropriate remedy in many cases, and can be a potentially powerful deterrent to wrongdoing, the focus on the legal accountability of companies is important, first, in the light of the drawbacks of individual liability concepts as a response to systemic and managerial fault and, second, from the perspective of ensuring that remedies fulfil compensatory as well as punitive needs.[4]

B. Recognizing the diversity of domestic legal systems

5. There are many differences between jurisdictions in terms of legal structures, cultures, traditions, resources and stages of development, all of which have implications for the issues covered by the guidance. For instance, some legal systems are highly codified, whereas others place more reliance on legal development through judicial decisions and precedent. Some domestic legal systems are adversarial, whereas others are inquisitorial, and some contain elements of both. Some legal systems are federal, or devolved in nature, whereas others are unitary. Some legal systems provide for corporate criminal liability, and some do not.[5] The guidance is therefore necessarily flexible and anticipates the need for adaptation to local needs and contexts. Identifying areas where improvement is needed in

[1] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.
[2] See A/HRC/17/31, principle 26, commentary.
[3] See A/HRC/32/19, annex, para. 16.2.
[4] See paras. 39-41 and 69-74 below.
[5] See paras. 6 and 7 below.

domestic legal regimes may be a complex task, and in some jurisdictions a formal legal review may be necessary. To assist with this, a model terms of reference for a formal legal review is included in figure 1, below.

Figure 1: Model terms of reference addressed to a law commission (or domestic equivalent) to enable a review of the coverage and effectiveness of laws relevant to business-related human rights abuses

1. The law commission or review body is requested to investigate and report on the following matters:

(a) To what extent may companies be liable under the laws of the jurisdiction for the adverse human rights impacts of their business activities? To what extent, and on what bases, may companies be legally liable for causing or contributing to severe human rights abuses (including severe human rights abuses committed by third parties, e.g. other corporate entities, or State agencies)? What are the policy reasons for any exceptions or exclusions and are these justified?

(b) To what extent does the scope of legal regimes or the principles for determining corporate legal liability differ depending on the mode of enforcement (e.g. whether enforcement is carried out by public authorities or private individuals)? What are the reasons for any differences, and are these justified?

(c) To the extent that corporate legal liability is possible under the laws of the jurisdiction, are the principles for assessing corporate legal liability sufficiently clear for the purposes of legal certainty and proper administration of justice? Do they respond adequately to cases involving allegations against (a) constituent companies of group business enterprises; and (b) business enterprises that make use of supply chains? Do they take account of the need to ensure that risks of adverse human rights impacts of business activities are properly identified, prevented and mitigated, and that workers (including temporary workers) are properly managed and supervised to prevent and mitigate adverse human rights impacts?

(d) Do relevant domestic legal regimes respond adequately to the challenges of investigation and enforcement in cross-border cases? Do domestic legal regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and State obligations under international human rights treaties to which the jurisdiction is party?

(e) What sanctions and other remedies can be ordered following a finding of corporate legal liability for adverse human rights impacts of business activities? Do these meet applicable international standards as regards the components and procedural requirements of an effective remedy? Are they responsive to gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization?

2. The law commission or review body is requested to make recommendations that take into account:

(a) The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework;

(b) Other applicable international standards and guidance relating to corporate legal accountability and access to remedy in cases of business-related human rights abuses;

(c) Where relevant, the commitments made by the jurisdiction in its national action plan;

(d) Its findings in relation to the issues described in paragraph 1 above;

(e) International human rights treaties and other relevant treaties, bilateral and multilateral agreements that the State is party to, including, where appropriate, relevant recommendations made to the State by treaty bodies and peer review mechanisms.

3. The review process will be public, open, inclusive and evidence-based and will involve:

(a) A review structure that will provide adequate opportunities for contribution by key stakeholders;

(b) Proper consultation with legal professionals, criminal justice practitioners, public interest lawyers, members of the judiciary, parliamentarians, academics, affected victims, representatives of civil society organizations, representatives of trade unions and representatives of businesses;

(c) An examination of evidence from research, including evidence of experiences in other countries in the development and implementation of reforms of the laws relating to corporate legal liability in cases of alleged business involvement in human rights abuses.

II. Explanatory notes to the guidance

A. Enforcement of public law offences

1. Principles for assessing corporate legal liability

Box 1: Key concepts 1

"Criminal law" is concerned with protection of the public from conduct deemed to be harmful or antisocial and regulates the conduct of private actors with a view to preventing, punishing and deterring such behaviour. "Administrative" (sometimes called "regulatory" or "quasi-criminal") regimes regulate conduct that is deemed harmful or antisocial or that is required (e.g. for reasons of public safety) to meet certain regulatory standards; however, the requirements that must be satisfied to establish such offences may be different (e.g. not as stringent) as those required to establish a criminal offence. In the guidance, criminal and administrative regimes are referred to as "domestic public law regimes" and the offences created under such regimes as "public law offences" or simply "offences".

Part I of the guidance is concerned with enforcement by "public authorities" (or "relevant enforcement agencies"). Enforcement of legal standards by private individuals is the subject of part II.

The term "primary liability" refers to the legal liability of the main perpetrator of an offence. "Secondary liability" may exist where the defendant has caused, or contributed to, offences committed by another party (i.e. the "main perpetrator"). Common bases in domestic public law regimes for secondary liability include "inciting", "instigating" or "encouraging" an offence or "aiding and abetting" the commission of an offence. Secondary liability is sometimes referred to as "complicity liability".

"Human rights due diligence" refers to the processes and activities undertaken by business enterprises to identify, prevent and mitigate their adverse human rights impacts (see principles 17-21 and commentary of the Guiding Principles).

Offences of "absolute liability" do not require proof that the defendant intended the

relevant acts or harm, or that it was negligent, in order to establish legal liability. Instead, liability flows from the occurrence of a prohibited event, regardless of intentions or negligence. However, the relevant domestic public law regime may permit the company to raise a defence on the basis of its use of "due diligence" to prevent the prohibited event. Where this is the case, the offence may be described as one of "strict liability" (rather than absolute liability).

(a) Key issues of context

(i) Types of legal liability under public law regimes

6. Most jurisdictions recognize the possibility of corporate legal liability for public law offences, although there are differences from jurisdiction to jurisdiction in the kinds of offences for which a company can be liable and the types of legal liability that a company can attract. In some jurisdictions, companies may attract criminal liability as well as administrative liability. However, in other jurisdictions, criminal liability may only attach to individuals as "natural persons". In jurisdictions where corporate criminal liability is not possible, other kinds of public law regimes and sanctions (e.g. "regulatory", "administrative" or "quasi-criminal") play a vital role.

7. For these reasons, the guidance is not confined to criminal offences, but potentially encompasses a variety of sources of public law liability applicable to companies, including regulatory, administrative and quasi-criminal liability.

(ii) Companies, business enterprises, group business enterprises and supply chains

8. The challenges in terms of accountability and access to remedy posed by the structural and managerial complexity of many business enterprises are outlined in the report.[6] Domestic public law regimes determine the legal responsibilities of parent companies (and other companies within a group business enterprise) in varying ways and to varying degrees depending on regulatory contexts and needs. However, in many domestic public law regimes relevant to respect by business enterprises of human rights, there is lack of clarity as to the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the activities of other constituent companies. This is particularly so with regard to parent companies (as regards the management and supervision of subsidiaries) and business enterprises that make use of complex supply chains.

9. For these reasons, the guidance highlights the need for clearer articulation, through domestic public law regimes, of legal standards of management and supervision with respect to the identification, prevention and mitigation of adverse human rights impacts, particularly with respect to parent companies (1.5) and business enterprises that make use of supply chains (1.6). Furthermore, the guidance recommends regular review of domestic public law regimes to ensure that they continue to provide the necessary coverage and adopt appropriate approaches in the light of evolving circumstances and international obligations (1.9).

[6] See A/HRC/32/19, paras. 21-23.

(iii) Attributing legal liability to a company: primary liability

10. Establishing corporate legal liability entails showing, to the requisite standard of proof,[7] that all the elements of the offence are satisfied. In criminal cases, these elements are likely to involve both "mental" and "physical" elements. The "mental" elements refer to the knowledge and intentions of the alleged offender. The "physical" elements refer to the offender's acts and whether they were the cause of the relevant harm.

11. Because companies are a legal construction, the application of tests for establishing liability for public law offences can be problematic. This is a particular problem in relation to criminal offences that require proof that the company intended the harm or intended to commit the acts that caused the harm. Under some domestic law tests, proving corporate "intent" will require the identification of individuals working for or on behalf of the company who themselves intended the relevant harm and whose intentions can be attributed to the company. This is referred to as the "identification" approach to corporate criminal liability.

12. The "identification" approach has been criticized for its limitations, in some contexts, with respect to systemic problems that may exist within companies, such as poor management and supervision.

13. A further, widely applied principle for assessing corporate legal liability is "vicarious liability", whereby companies may be liable for acts of certain employees or agents, on the basis that the company "acts through" those individuals. While tests for vicarious liability vary from jurisdiction to jurisdiction, common limitations on this type of liability are that the employee or agent must have either been operating within the scope of his or her employment responsibilities and/or for the benefit of the company.

14. Alternative tests applied in some jurisdictions include those that focus on the quality of a company's management, rather than the actions and intentions of specific individuals, such as tests based on "corporate culture" to determine whether there has been "corporate fault"; or a "collective fault" approach, whereby knowledge, intentions and actions of a group of individuals can be aggregated.

15. In cases where business enterprises have caused or contributed to adverse human rights impacts, but where there is no detailed information about the relevant corporate structures, contractual relationships, internal management processes and reporting procedures, it can be difficult to identify the company (or companies) that should be legally accountable and on what basis. Some domestic law regimes seek to alleviate those problems in specific regulatory contexts by allowing the necessary elements of fault to be inferred from the surrounding circumstances (effectively shifting the burden of proof onto the corporation to show why it should not be held legally responsible a specific case), or in some circumstances by dispensing with the need to prove corporate "knowledge" or "intentions" altogether.[8]

16. The guidance highlights the need for States to consider methods of attributing legal liability to companies that address systemic fault as well as individual fault (1.4) and to avoid approaches that make corporate legal liability contingent upon the conviction of a responsible individual. In addition, the guidance highlights the need for States to develop approaches to the distribution of evidential burdens of proof that take account of considerations of access to remedy as well as considerations of fairness to all parties (1.7).

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[7] In serious criminal cases, the requisite standard of proof is likely to be "beyond reasonable doubt" (or its equivalent). However, "administrative" or "regulatory" offences may adopt a less stringent approach.

[8] See box 1: key concepts 1, for "strict liability" and "absolute liability".

(iv) Attributing legal liability to a company: secondary liability

17. An alternate source of corporate legal liability is secondary liability.[9]

18. There is a considerable variation from jurisdiction to jurisdiction and regime to regime as to the type of knowledge that must be proved to establish secondary liability (e.g. the extent to which there must have been shared intent with the main perpetrator to commit an offence) and the causal relationship between the secondary party's actions and the offence (e.g. whether the secondary party's actions were the direct cause of the offence or merely made it more likely).[10] Domestic legal regimes are not always clear as to the modes and levels of contribution to human rights abuses of a third party that will give rise to corporate legal liability on the basis of secondary liability and the manner of attribution of acts, knowledge and intentions to companies.

19. Further problems emerge from domestic legal regimes where secondary offences are not treated with sufficient seriousness (e.g. compared to the primary offence) or where the liability of a secondary party is contingent upon a successful prosecution of the main perpetrator (which can have serious implications for access to remedy in cases where the main perpetrator cannot be found, is deceased or, in the case of a company, has been dissolved or has made a claim to some form of immunity).

20. The guidance aims to address common problems relating to the secondary liability of business enterprises, highlighting the need for greater clarity as to the modes and levels of contribution that will lead to legal liability (2.1) and the principles for attributing mental elements of offences to companies (2.2). In addition, it recommends that secondary offences are treated with the same seriousness as primary offences and as conceptually distinct from the primary offence, and that liability is not contingent on the liability of the main perpetrator (2.3).

(v) Human rights due diligence

21. The exercise of human rights due diligence by a business enterprise may become relevant to questions of corporate legal liability in several ways. First, the exercise of human rights due diligence can be made an explicit legal requirement. Second, it may be used as evidence that the company was not negligent in a specific case (i.e. where the presence of negligence is an element of an offence). Third, it may be an explicit statutory defence to an offence.

22. In law, "due diligence" is a standard of care. The Guiding Principles provide a global standard for human rights due diligence.[11] There is scope for better integration of this global standard in many domestic law regimes.

23. The guidance highlights the need for human rights due diligence concepts to be properly integrated into relevant domestic law regimes (3.1 and 3.2) and for relevant State agencies and judicial bodies to have access to, and take regulatory and enforcement decisions by reference to, robust and credible standards (3.4). However, the guidance also recognizes domestic law regimes that make targeted use of strict or absolute liability (e.g. in environmental or consumer law contexts) as a means of encouraging especially high levels of vigilance, where this is especially needed (3.3).

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[9] Ibid., for "secondary liability" and "complicity liability".

[10] See the report by J. Zerk entitled "Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies", prepared for OHCHR (February 2014), available from www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, pp. 37-39.

[11] See A/HRC/17/31, principles 17-21 and commentary.

2. Supporting the work of State agencies responsible for the investigation and enforcement

Box 2: Key concepts 2

The term "enforcement agencies" potentially encompasses prosecutors, police and other regulatory bodies with responsibility for investigating and enforcing standards relating to respect by business enterprises of human rights.

The term "enforcement discretion" refers to the discretion of an enforcement agency as to whether and how to respond to allegations that an offence has been committed. The use of enforcement discretion may be regulated by an "enforcement policy" promulgated by the relevant State authority or some other government or judicial body.

(a) Key issues of context

(i) Support for enforcement agencies tasked with investigation and enforcement

24. Investigations and prosecutions of business enterprises can be resource-intensive and time-consuming, especially where there is a cross-border element or where complex corporate structures are involved. In the face of multiple, sometimes conflicting, demands on limited resources, prosecutors may be reluctant to prioritize a legally challenging, novel or complex case.

25. The guidance therefore highlights the importance of political support to pursue such cases (4.1). The guidance also includes provisions designed to promote greater policy coherence in the internal functioning of, and between, enforcement agencies (4.2 and 4.4).

(ii) Transparency and accountability with respect to enforcement discretion

26. Enforcement agencies normally have some level of discretion over whether to take enforcement action against a company, the extent and nature of the charges and whether, when and on what terms to discontinue or settle legal proceedings. However, where the reasoning behind a decision not to investigate or bring charges is not transparent, it may create a perception that remedy has been arbitrarily denied and leave those affected without a clear understanding as to further options.

27. The guidance therefore covers issues such as the use of enforcement discretion in accordance with a publicly available enforcement policy (4.3), rights of formal challenge (5.1) and public access to information (5.2).

(iii) Resources, training and expertise

28. OHCHR research and consultations confirm that lack of resources, training and expertise to pursue complex business-related human rights cases against companies, especially in a cross-border context,[12] is a serious concern in many jurisdictions.

29. The guidance identifies a number of ways that States can improve the resources available to enforcement agencies to enforce legal standards relevant to ensuring respect by business enterprises of human rights (6.1, 6.2 and 6.3).

(iv) Ensuring the safety of victims, other affected persons, human rights defenders, witnesses, whistle-blowers and their legal representatives

30. Intimidation and reprisals against victims, witnesses, human rights defenders, whistle-blowers and their legal representatives are serious concerns in some jurisdictions.

[12] See paras. 32-38 below.

In addition to placing people at risk of further abuses, such practices may seriously hamper effective investigation and enforcement. However, practical steps can be taken to mitigate these risks, for example, in the methods used to collect and store evidence, or in the means by which testimony is given. In responding to complaints and allegations, practitioners working within enforcement agencies need to be sensitive to the different challenges and risks that may be faced by women and men and the needs and concerns of individuals and groups at heightened risk of marginalization or vulnerability.[13]

31. The guidance highlights the need to take appropriate steps to ensure that relevant individuals are protected from intimidation and reprisals (7.1) and that the particular risks faced by individuals or groups at heightened risk of vulnerability or marginalization are properly taken into account (7.2).

3. Cooperation in cross-border cases

Box 3: Key concepts 3

For the purposes of the guidance, a "cross-border" case is one where the relevant facts have taken place in, the relevant actors are located in or the evidence needed to prove a case is located in more than one State.

The term "extraterritorial jurisdiction", in the context of public law regulation and enforcement, refers to the ability of a State, through various legal, regulatory and/or judicial mechanisms, to prescribe and enforce laws with respect to companies and business activities outside its own territory.

"Joint investigation" teams are those comprised of investigators and law enforcement practitioners from more than one State (and usually several States) set up for a fixed period and on the basis of an agreement between the participating States and/or relevant State agencies, for a specific investigative purpose.

(a) Key issues of context

(i) Lack of clarity at the international level as to the appropriate use of extraterritorial jurisdiction in cross-border business and human rights cases

32. The use of extraterritorial jurisdiction by States is governed by international law. Under international law, direct assertions of jurisdiction over foreign companies and business activities must be justified according to one or more internationally recognized bases of jurisdiction: territoriality, nationality, the protective principle, passive personality and universality.[14] In addition, assertions of extraterritorial jurisdiction are generally agreed to be subject to an overarching requirement of "reasonableness" in the way in which it is exercised.[15]

33. However, while there is international consensus as to when States can exercise extraterritorial jurisdiction in business and human rights cases, there is less clarity as to the

[13] See guidance produced by the United Nations Special Rapporteur on Human Rights Defenders on the protection of human rights defenders in the context of economic development projects, A/68/262.

[14] For an explanation of each of these principles, see J. Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas", Harvard Corporate Responsibility Initiative working paper No. 59 (June 2010), pp. 18-20, available from www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.

[15] Ibid, p. 20.

circumstances in which they should or must exercise such jurisdiction.[16] Against this background, some international treaty bodies have recommended that home States take steps to prevent and/or punish abuse abroad by business enterprises domiciled within their respective jurisdictions.[17]

34. The roles and responsibilities of interested States in cross-border cases are clarified for some regulatory contexts in international legal regimes.[18] For instance, some international legal regimes require that participating States carry out direct extraterritorial enforcement with respect to business operations or activities outside their own territory (e.g. by virtue of being the State of domicile of a parent company of a business enterprise) or may require or authorize the use by participating States of extraterritorial jurisdiction over foreign business enterprises or activities on other bases (e.g. on the basis that victims were nationals or residents of the regulating State).

35. The guidance highlights the need for greater clarity in domestic law regimes as to their intended geographic scope (1.8). Regular reviews of domestic public law regimes are recommended to check whether those regimes provide the necessary coverage and appropriate range of approaches with respect to evolving business-related human rights challenges and in the light of the State's obligations under international human rights treaties (1.9). In addition, the guidance calls for the active participation of States in initiatives aimed at improving domestic legal responses to cross-border business and human rights challenges (10.1).

(ii) Cooperation and coordination between relevant State agencies in cross-border cases of business involvement in human rights abuses

36. States have entered into both formal and informal bilateral and multilateral arrangements to facilitate international cooperation with respect to legal assistance and enforcement of judgments in cross-border cases, including cross-border cases concerning adverse human rights impacts of business activities.[19] Some international instruments of relevance to cross-border business-related human rights abuses also include provisions designed to facilitate exchange of information and expertise between domestic law enforcement and judicial bodies, for instance, to enable better analysis of the nature and scale of specific risks, as an aid to detect possible crimes and as a way of strengthening

[16] See A/HRC/29/39, paras. 33-37 and the OHCHR working paper "State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses" (April 2015), available from ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf.

[17] See, for example, Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, paras 38-46. See also E/C.12/2011/1, para. 5; International Labour Organization recommendation 190, para. 15, available from www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm.

[18] See, for example, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, articles 3 and 4; and the United Nations Convention Against Transnational Organized Crime, article 15.

[19] Some of the treaties are designed to have broad application, such as the European Convention on Mutual Assistance in Criminal Matters, and various bilateral mutual legal assistance treaties. See also the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Other international legal regimes have been established to facilitate greater international cooperation with respect to specific kinds of crime. See, for example, the United Nations Convention Against Transnational Organized Crime, which includes provisions relating to mutual legal assistance and the use of joint investigation teams. Note, however, that cooperation may be subject to a number of qualifications, such as a requirement for "double criminality" (i.e. similar recognition by both States of the criminality of the conduct) and requirements regarding respect for the rule of law and due process.

cooperation through progressive improvement of the domestic regimes of participating States.[20] In various fields of law enforcement, States have developed a range of cooperative approaches, including participation in "peer review" evaluation of regulatory effectiveness and capacity, capacity-building activities and the provision of technical assistance.

37. However, regardless of the international arrangements put in place, State agencies can experience a range of practical difficulties that can undermine treaty objectives and hamper effective cooperation.

38. The guidance responds to those challenges by setting out a range of practical steps that States could consider to enhance the ability of relevant State agencies to seek and obtain assistance from counterparts in other jurisdictions, including ensuring the necessary international arrangements are in place (9.2), enabling investigations through joint investigation teams (9.3), ensuring access to information and training (9.4), developing information repositories (9.5), and promoting awareness and facilitating networking between law enforcement practitioners and their counterparts in other States (9.6).

4. Sanctions and other remedies

Box 4: Key concepts 4

In cases where the adverse human rights impacts of business enterprises result in corporate legal liability, the most likely sanctions will be "financial penalties" (or "fines"). However, "non-financial remedies", such as restorative, rehabilitative or preventative measures, may also be specified, depending on the powers of the relevant judicial mechanism.

The term "sanction" refers to the aspects of a remedy intended to punish the offender. Another term for such remedies is "punitive remedies". The primary goal of "compensatory remedies", on the other hand, is to compensate a victim for the loss or harm suffered.

(a) Key issues of context

(i) Financial penalties ("fines") and other, non-monetary remedies

39. There are many differences between jurisdictions (and between different regulatory regimes within jurisdictions) regarding how financial penalties are set. Financial penalties for "regulatory" offences (or "administrative" penalties) may be subject to a maximum statutory amount. In some cases, these amounts may not be sufficient to act as a credible deterrent.

40. While financial penalties appear to be most prevalent in cases involving corporate defendants, they may not, on their own, amount to an effective remedy.[21] From the perspective of victims, public apologies, orders for restitution, measures to assist with rehabilitation of people and/or resources and measures to ensure non-repetition of the abuse may be equally or more beneficial.

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[20] See OHCHR working paper, "Cross-border regulation and cooperation in relation to business and human rights issues: a survey of key provisions and state practice under selected ILO instruments" (2015), available from www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/PreliminaryILOtreaties.pdf. See also further resources available from www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

[21] In relation to severe human rights impacts, see further the guidance contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

41. The guidance emphasizes the importance of a range of sanctions and remedies for public law offences that can be tailored to suit the particular circumstances of a case and the particular needs of the affected individuals and groups (11.1 and 11.2). It highlights the importance of appropriate consultation with victims to ensure that their needs are adequately taken into account in the design of sanctions and other remedies (11.3). In addition, it highlights the need for appropriate monitoring of implementation of both punitive and compensatory remedies (11.4).

B. Private law claims by affected individuals and communities

1. Principles for assessing corporate legal liability

Box 5: Key concepts 5

The term "private law claims" refers to claims for legal remedy that are made, not by public authorities, but by private individuals and groups of individuals (referred to in the guidance as "claimants"). In this context, claimants may be persons directly affected by adverse human rights impacts of business activities or their families or other representatives or organizations, depending on the applicable rules on who has a right to bring a claim. Depending on the rules of the relevant legal system, private law claims may be made individually or joined with others as "collective redress actions".

The term "private law cause of action" refers to the legal basis on which the claim is made. Depending on the laws, structures and legal traditions of the relevant jurisdiction, the cause of action could be based on a statutory provision, general principles of law, legal precedent or some other basis (e.g. custom).

The elements required to prove corporate legal liability based on a private law cause of action will vary among regimes and among jurisdictions. These elements may include "corporate intent" to commit a wrongful act and/or "negligence". Some domestic law regimes make use of concepts of "strict liability" of "absolute liability" (see box 1, above).

The elements needed to demonstrate "negligence" vary among regimes and jurisdictions. However, a formulation common to many jurisdictions is: (a) the existence of a duty of care towards affected persons; and (b) the breach of the applicable standard of care, which (c) resulted in harm or injury (i.e. causation). The existence of a duty of care, and the relevant standard of care, will often depend on whether the harm was, or should have been, foreseeable to the defendant. "Gross negligence" and "recklessness" are treated in law as more serious variants of negligence on the basis of the high levels of culpability involved.

"Primary liability" for these purposes refers to the legal liability under private law of the individual or legal entity that has caused the harm or loss. "Secondary liability" may exist where the defendant has caused or contributed to harm or loss caused primarily by another party (i.e. the "primary wrongdoer"). Secondary liability is sometimes referred to as "complicity liability".

(a) Key issues of context

(i) Problems of gaps in coverage and lack of suitable causes of action

42. While there are potentially causes of action and theories of liability to cover many eventualities, in some jurisdictions it is not always possible to identify a private law cause of action that adequately covers or adequately describes the gravity of the kinds of business-related human rights abuses or impacts that have occurred.

43. In some civil law jurisdictions, it is possible to join private law claims for compensation to criminal law processes under the mechanism of *partie civile*. However, making the possibility of a private law claim entirely contingent upon a finding of legal liability under public law processes, or restricting the rights of private claimants to pursue their own claims because of an ongoing public law investigation, amount to potentially serious barriers to remedy.

44. The guidance highlights the need for States to ensure that there are possible causes of action referable to different kinds of business-related human rights abuses (12.1). Furthermore, the guidance recommends a regular review of domestic private law regimes to ensure that they provide the necessary coverage and adopt appropriate approaches in the light of evolving circumstances and international obligations (12.9). In addition, the guidance draws attention to the importance of maintaining a conceptual and procedural separation between private law claims and public law enforcement processes (12.6 and 12.7).

(ii) Companies, business enterprises, group business enterprises and supply chains

45. The accountability and access to remedy challenges posed by the structural and managerial complexity of companies and business enterprises, and especially group business enterprises, are outlined in the report.[22]

46. The guidance highlights the need for clear articulation in domestic private law regimes of legal standards of management and supervision with respect to the identification, prevention and mitigation of adverse human rights impacts, particularly as regards parent companies (see 12.3) and business enterprises that make use of supply chains (see 12.4).

(iii) Attributing liability to a company: primary liability

47. Domestic private law regimes adopt a range of approaches to the attribution of legal liability to companies, which may draw from "identification" approaches (i.e. that "identify" the acts of certain individuals as acts of the company) and/or "vicarious liability" approaches (i.e. that attribute liability on the basis that an employee or agent was acting on delegated authority).

48. However, approaches to attribution of liability that rely on the identification of culpable individuals have limitations as a response to the systemic problems that may exist within companies, such as poor management and supervision.

49. In business and human rights cases, it can be difficult and costly[23] to identify the company (or companies) that should be held legally accountable and on what basis, without detailed information about the relevant corporate structures, contractual relationships, internal management processes and reporting procedures. Some domestic private law regimes contain elements that alleviate those problems to some extent by allowing the necessary elements of fault to be inferred from the surrounding circumstances, or by applying objective standards to determine what would have been "foreseeable" to the corporate defendant (rather than what was subjectively "foreseen" by the defendant), or by dispensing with the need to prove corporate "knowledge" or "intentions" altogether through the use of "strict" or "absolute" liability.

50. The guidance highlights the need for approaches to private law liability that are capable of addressing systemic fault and individual fault (see 12.2). In addition, the

[22] See A/HRC/32/19, paras. 21-23.
[23] See paras. 57-61, below.

guidance suggests that States consider ways to ensure that the distribution of evidential burdens of proof takes account of considerations of access to remedy and considerations of fairness to all parties (see 12.5).

(iv) Attributing liability to a company: secondary liability

51. Companies may be legally liable under private law regimes for causing or contributing to human rights abuses of other individuals or entities by virtue of theories of secondary liability. Depending on the relevant domestic law regime, secondary liability under private law regimes may result from instigating or inciting a wrongful act or providing material assistance to the primary wrongdoer. In some jurisdictions, and under some regimes, secondary liability may result from omissions (e.g. failures to prevent wrongdoing) as well as positive acts.[24] The principles used to determine secondary liability vary from regime to regime and jurisdiction to jurisdiction.

52. Domestic legal regimes do not always articulate clearly the principles applicable to the assessment of the secondary liability of companies in private law claims arising from business-related human rights abuses. The modes and levels of contribution to such abuses that will give rise to secondary corporate liability require clarification in many domestic law regimes.

53. It would be a potentially serious barrier to remedy were the liability of a secondary party to be contingent upon a successful private law claim against primary wrongdoer, especially where the primary wrongdoer cannot be found, is deceased or, in the case of a corporate entity, has been dissolved or makes a claim to some form of immunity.

54. The guidance therefore highlights the need for clarity as to the modes and levels of contribution that will lead to corporate legal liability based on theories of secondary liability under private law regimes (13.1). In addition, the guidance highlights the importance of allowing secondary liability to be determined without first establishing the legal liability of a specific primary wrongdoer (13.3).

(v) Human rights due diligence

55. In many jurisdictions, a company's human rights due diligence will be relevant to the question of whether the company had discharged the applicable standard of care for the purposes of private law tests for negligence. The Guiding Principles provide a global standard for human rights due diligence.[25] However, OHCHR research raises questions as to whether this standard for human rights due diligence is adequately reflected in domestic law regimes and properly understood by domestic authorities and judicial bodies.

56. The guidance therefore highlights the need for human rights due diligence concepts to be properly integrated into domestic law due diligence standards (14.1 and 14.2) and that relevant State agencies and judicial bodies have access to, and take regulatory and enforcement decisions by reference to, robust and credible standards (14.4). However, the guidance also recognizes domestic private law regimes that make targeted use of strict or absolute liability (e.g. in environmental or consumer regimes) as a means of encouraging high levels of vigilance, for example, in cases of business activities where the risks of severe human rights impacts are particularly high (14.3).

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[24] It is not always obvious whether a set of facts is best conceptualized as a case of primary or secondary liability. For instance, the same set of facts may be able to support a cause of action based on both negligence (i.e. "primary liability", on the basis that a company had failed to foresee and/or respond adequately to a danger) and secondary liability (e.g. based on a company's material contributions to a state of affairs that resulted in human rights abuses).

[25] See A/HRC/17/31, principles 17-21 and commentary.

2. Overcoming financial obstacles to legal claims

Box 6: Key concepts 6

The term "State-based legal aid" refers to funding provided from public sources to help people, especially those who are on low incomes, to pay for legal advice and/or the costs of legal proceedings.

The term "costs" refers to the financial amounts incurred by a party to litigation that are associated with either pursuing or defending against that litigation. The term encompasses lawyers' fees and court costs and other expenses, such as transportation, communication, translation and accommodation costs and costs of obtaining expert testimony.

The term "security for costs" refers to an amount of money paid into court or a bond or a guarantee that is provided by a claimant that can be called upon if the claimant becomes liable to pay a defendant's costs and is unable to do so.

(a) Key issues of context

(i) Diversifying funding sources

57. The factors that prevent people from being able to fund their legal claims are not confined to business and human rights cases. Instead, they are frequently the consequences of wider problems, such as policies on public spending, lack of resources for courts or delays in court processes due to the operation of procedural rules. Those wider challenges are beyond the scope of the guidance.

58. State-based legal aid is an important source of funding for low-income claimants in many jurisdictions. However, in many jurisdictions, it is becoming increasingly difficult to access in practice. Where it is available, it is unlikely to cover the full cost of legal proceedings in complex legal cases.

59. States have a vital role to play in fostering the conditions needed for diversification of litigation funding options. The guidance highlights various ways in which States can facilitate a more diverse range of options for funding of private law claims (15.1-15.6). While these would not be limited to private law claims arising from allegations of business-related human rights abuses, they are nevertheless included because of their practical significance to access to remedy in such cases.

(ii) Court costs and fees

60. Addressing the high costs of litigation is an essential part of addressing financial obstacles to legal claims in business-related human rights cases.

61. The guidance identifies a number of steps that States could consider to reduce the financial obstacles faced by claimants in business and human rights cases through reductions to court costs and fees (16.1-16.7). While the implications of these would not be limited to private law claims arising from allegations of business-related human rights abuses, they are nevertheless included because of the significance of court costs as a barrier to remedy in such cases.

3. Cooperation in cross-border cases

Box 7: Key concepts 7

"Cross-border" cases are those where the relevant facts have taken place in, the relevant actors are located in, or the evidence needed to prove a case is located in, more than one

State.

The term "forum State" refers to the State in which a private law case is (or is to be) litigated.

The term "extraterritorial jurisdiction", in the context of a private law claim, refers to the ability of State-based judicial mechanisms of the forum State to adjudicate and resolve disputes with respect to private actors and/or activities outside the territory of the forum State. This kind of jurisdiction is sometimes also referred to as extraterritorial "adjudicative jurisdiction".

(a) Key issues of context

(i) Lack of clarity as to the appropriate use of extraterritorial jurisdiction in private law cases

62. While the exercise of extraterritorial jurisdiction in the public law sphere is governed by international law,[26] the use of extraterritorial jurisdiction in private law cases is governed largely by the domestic law of the forum State.[27] Consequently, outside the scope of regional or international regimes to regulate the use of adjudicative jurisdiction,[28] there is not yet evidence of a coherent trend in State practice with respect to the roles and responsibilities of interested States in cross-border private law cases.

63. OHCHR research has identified a number of differences of approach with respect to key issues such as "universal civil jurisdiction", the applicability of a doctrine of "exhaustion of legal remedies", the extent to which a factual nexus is required between the claim and the forum State for the courts of the forum State to be able to exercise jurisdiction at all and, finally, the extent to which the nature and severity of the abuse may have a bearing on the way that jurisdictional rules are applied.[29] At the same time, some international treaty bodies have called on home States to take steps to facilitate greater access to State-based judicial mechanisms by those adversely affected by foreign business-related human rights impacts of business enterprises domiciled in the respective home States.[30]

64. The guidance highlights the need for clarity in relevant domestic private law regimes as to their intended geographic scope (12.8). In addition, the regular review of domestic private law regimes is recommended to ensure that those regimes provide the necessary coverage and appropriate range of approaches with respect to evolving business-related human rights challenges and in the light of the State's obligations under international human rights treaties (12.9).

(ii) Cooperation and coordination between judicial bodies and other State agencies in cross-border cases of business involvement in human rights abuses

65. States have entered into international treaties to facilitate international cooperation with respect to legal assistance (e.g. regarding the taking of evidence) and enforcement of

[26] See paras. 32-35, above.
[27] This body of domestic law is often referred to as "conflicts of law" or "private international law".
[28] See for instance, within the European Union, Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[29] See note 16 above.
[30] See, for example, Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, para. 44.

judgments in private law cases with a cross-border element.[31] However, as in the field of public law,[32] these require effective implementation at a practical level to ensure that mutual legal assistance in private law cases can be quickly and efficiently sought and obtained.

66. The guidance sets out a range of practical steps that States can consider to enhance the ability of judicial bodies and other relevant State agencies to seek and obtain legal assistance from counterparts in other jurisdictions in private law cases, including ensuring appropriate international arrangements are in place (17.2), developing information repositories (17.4) and promoting awareness and facilitating networking between law enforcement practitioners and their counterparts in other States (17.5).

(iii) Access to information for claimants and their legal representatives

67. Claimants may wish to refer to information held by State agencies (for example, licensing bodies, environmental authorities, workplace health and safety agencies, or consumer protection bodies) in order to support their claim that an applicable legal standard relating to respect by business enterprises of human rights has been breached. In addition, there may be other information in the public domain, for instance, relating to regulatory policies with respect to a particular business sector, that may be relevant to legal proceedings. However, in many cases, and particularly in cross-border cases, this information can be difficult and expensive to access.

68. The guidance highlights the need for States to work bilaterally and multilaterally to increase the speed and ease with which information can be sought and obtained from relevant State agencies in other States for use in judicial proceedings (18.1) and to achieve greater alignment between different jurisdictions with respect to access to information and issues such as data protection, protection of victims and their legal representatives, protection of whistle-blowers and legitimate requirements of commercial confidentiality (18.2).

4. Private law remedies

Box 8: Key concepts 8

The most likely remedies in private law cases will be "monetary damages". However, "non-monetary remedial measures", such as restorative, rehabilitative and preventative measures may also be awarded, depending on the powers of the relevant judicial body.

In some jurisdictions, the remedies that may be awarded in a private law case may include a "punitive" as well as a compensatory element. Whereas the aim of "compensatory remedies" is to compensate a claimant for the loss or harm suffered, the primary goal of a "punitive remedy" is to punish the wrongdoer and to provide deterrence from future wrongdoing. Punitive remedies may be monetary or non-monetary. Cancellation of a licence to operate is an example of a non-monetary punitive remedy.

[31] See for instance the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, or the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

[32] See paras. 36-38, above.

(a) Key issues of context

(i) Compensatory damages, punitive damages and other non-monetary remedies

69. Domestic private law regimes differ in terms of the kinds of remedies that can be awarded following a successful private law claim. For instance, monetary damages may be purely compensatory or may have a punitive element. Methodologies for calculating the correct amount of compensatory monetary damages vary from jurisdiction to jurisdiction. Some private law regimes may also provide for non-monetary remedies, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, public apologies and guarantees of non-repetition. In some cases, appropriate non-monetary remedies may include arrangements for commemorations or to contribute to the preservation of cultural heritage.

70. Useful guidance as to what constitutes an effective remedy in practice can be found in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Private law regimes should recognize and take account of the different and sometimes unique ways that adverse human rights impacts of business activities can be experienced by different individuals and groups within society and especially by individuals and groups at heightened risk of vulnerability or marginalization.

71. The guidance highlights the importance of a flexible range of available sanctions and remedies in private law cases that can be tailored to the particular circumstances of a case and the particular needs of the affected persons and their communities (19.1-19.3). In addition, the guidance highlights the need for appropriate monitoring of the implementation of sanctions and remedies (19.4).

(ii) Distribution of monetary compensation awarded following a collective redress action

72. In the course of its research and consultations, OHCHR identified a number of common challenges in relation to the distribution of monetary compensation following a settlement or damages award in a large claim using a collective redress mechanism. These include problems identifying and contacting the correct claimants, lack of transparency with respect to the compensation amounts and distribution methodology, ensuring non-discrimination and challenges arising from the use of third parties to distribute funds.

73. Further work is needed, both at the domestic level and in relevant regional and international forums, to develop standards to ensure that those entitled to receive monetary compensation following a private law collective (or "group") action are properly and proactively advised of their entitlements to compensation and that they receive appropriate support and follow-up services in a manner that is sensitive to gender issues and the needs and concerns of individuals and groups at heightened risk of marginalization or vulnerability.

74. The guidance therefore highlights the importance of appropriate regulation, guidance or professional standards to ensure that monetary compensation is distributed among members of affected groups of claimants in a fair, transparent and non-discriminatory way (19.6).

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Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned

Report of the United Nations High Commissioner for Human Rights

Summary

In its resolution 27/31, the Human Rights Council requested the United Nations High Commissioner for Human Rights to prepare a compilation of practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned.

In the present report the High Commissioner focuses on examples of practices that optimize civil society's transformative potential. In this regard, he identifies five essential ingredients: a robust legal framework compliant with international standards that safeguards public freedoms and effective access to justice; a political environment conducive to civil society work; access to information; avenues for participation by civil society in decision-making processes; and long-term support and resources for civil society.

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I. Introduction

1. In its resolution 27/31, the Human Rights Council, recognizing the crucial importance of the active involvement of civil society, at all levels, in promoting good governance, including through transparency and accountability, which is indispensable for building peaceful, prosperous and democratic societies, requested the United Nations High Commissioner for Human Rights to prepare a compilation of practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned.

2. To this end, on 28 April 2015, the Office of the United Nations High Commissioner for Human Rights (OHCHR) sent notes verbales to Member States, national human rights institutions, civil society organizations and international and regional organizations, followed by a reminder on 8 July 2015. A total of 89 responses were received, demonstrating the importance given to the issues addressed in resolution 27/31.[1]

3. The present report reflects input from all regions, based on contributions received from Member States, national human rights institutions and diverse civil society actors, including international and regional networks, academics and faith-based organizations, as well as United Nations and regional entities.

4. In a context of shrinking civil society space worldwide, it is important to share practices that highlight the benefits of creating and maintaining an enabling environment for civil society. In the present report the High Commissioner focuses on examples of proactive practices that optimize civil society's transformative potential.[2] He identifies five ingredients which are essential in this regard: a robust legal framework compliant with international standards and a strong national human rights protection system that safeguards public freedoms and effective access to justice; a political environment conducive to civil society work; access to information; avenues for participation by civil society in policy development and decision-making processes; and long-term support and resources for civil society.

5. According space to civil society is not optional. International human rights law places an obligation on States to respect rights and freedoms that are indispensable for civil society to develop and operate, including the freedoms of opinion and expression, peaceful assembly and association and the right to participate in public affairs. International law also protects the lives, liberty, physical integrity and privacy of civil society actors from arbitrary State interference.

6. Even if the law did not require it, there are compelling reasons to protect civil society space. Effective avenues for civic participation contribute to societal cohesion and give people, including minorities and those at the margins of society, a way to make their voices heard. Civil society also plays a crucial role in facilitating participation in public life and can allow people to contribute to policy development, and even decision-making. There is also a persuasive business and economic case for a strong civil society. Indeed, business and civil society have a shared interest in an environment that respects the rights to freedom

[1] While it was not possible to reflect all the submissions received in the present report, they can be found at www.ohchr.org/EN/AboutUs/Pages/ReportHConCivilSociety.aspx.

[2] Measures to restrict civil society activity are described at length in various reports of United Nations independent experts to the Human Rights Council as well as reports and statements by the United Nations High Commissioner for Human Rights and the reports of the Secretary-General on reprisals against individuals and groups for cooperating with the United Nations.

of expression and association, is pluralistic and non-discriminatory, upholds the rule of law and promotes transparency and access to information.

7. Allowing voices to be heard, even when they express criticism or unpopular views, is key to holding decision makers to account and to ensure that policies are reviewed, lessons learned and improvements made. Countries where civil society space is protected reap significant dividends in terms of long-term stability.

8. Vibrant civil society participation in the United Nations human rights system is indispensable to the effective protection and promotion of human rights. Civil society actors identify protection and other gaps in the international architecture, alert the international community of impending crises and campaign for the creation of new standards and mechanisms. Their participation enriches the system's responses by linking them to what is happening at the country level.

9. Yet, civil society is under attack in too many places, and with an increasing variety of weapons. States that seek to restrict civil society space continue to find creative ways to put pressure on civil society, whether by restricting freedoms by law or resorting to repressive and violent methods to silence voices perceived as critical. Such approaches are easily and increasingly replicated in all regions. Civil society also faces threats from other actors, such as non-State armed groups. There are a growing number of allegations of intimidation and threats against civil society actors, including environmental and land rights activists, by the private sector as well. In many countries, women civil society actors face disproportionately adverse reactions, based on discriminatory stereotypes, by both State and non-State actors attempting to delegitimize their work and isolate them from their communities.

10. The OHCHR global thematic strategy, "Widening the democratic space", provides a framework to strengthen work with civil society, supporting efforts to expand and protect civil society space. The Office implements this priority through over 500 activities at headquarters and in its field presences worldwide.

11. Civil society engagement can be viewed as a threshold issue: if space exists for civil society to engage, there is a greater likelihood that all rights will be better protected. Conversely, the closing of civil society space, and threats and reprisals against civil society activists, are early warning signs of instability. Over time, policies that delegitimize, isolate and repress people calling for different approaches or legitimately claiming their rights can exacerbate frustrations and lead to instability or even conflict.

II. Conditions for creating and maintaining civil society space: good practices

A. Supportive legal framework and effective access to justice

1. Legislation

12. The right to freedom of opinion and expression and to peaceful assembly and association and the right to participate in public affairs, together with the principle of non-discrimination[3] serve as vehicles for civic activity. It is through the safe and free exercise of

[3] These rights are guaranteed by the International Covenant on Civil and Political Rights (arts. 19, 21, 22 and 25); the International Covenant on Economic, Social and Cultural Rights (arts. 8 and 15); the Convention on the Elimination of All Forms of Discrimination against Women (art. 3); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5); the

these human rights that people are able to contribute to political, social, cultural and economic development.

13. Constitutions across all regions guarantee the right to freedom of opinion and expression and to peaceful assembly and association, the right to participate and the principle of participatory democracy. Yet the gap between the text and the everyday exercise of public freedoms can be significant. A comprehensive legal framework (e.g., legislation, by-laws and administrative rules and practices) that is compliant with the international standards protecting public freedoms is a prerequisite to creating and maintaining a safe, enabling environment for civil society to carry out activities.

Freedom of opinion and expression

14. In its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee states that a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other rights contained in the International Covenant on Civil and Political Rights; it constitutes one of the cornerstones of a democratic society. The European Court of Human Rights has consistently supported civil society's role in bringing matters of public interest to open debate.[4] Media contribute to public space where matters of public interest are debated and give voice to diverse perspectives, including to indigenous or minority communities, refugees and migrants, in diverse languages, in print and online, including in versions accessible for persons with disabilities.

15. In Croatia, independent and pluralist media freely monitor and report on human rights issues, acting as a watchdog.[5] Civil Space Initiative cited laws in Argentina and Uruguay as positive examples of the redistribution of broadcast frequencies to counter media monopolies.[6] In Austria, the Ombudsman Board features in a weekly television programme to inform the public and openly discuss sensitive matters such as complaints of maladministration and human rights issues. Panel debates or phone-ins featuring public officials together with representatives of civil society assist in information sharing, provide an opportunity to hear different viewpoints and contribute to transparency and informed decision-making. In El Salvador, television and radio programmes provide an opportunity for questions to be raised and addressed publicly.[7]

Freedom of association

16. Minimal legal and administrative provisions, favouring simple notification to a neutral body and available to all at little or no cost, with no compulsory registration requirement for basic operations, best encourage a diverse and independent civil society. The Constitution of Montenegro recognizes that forming an association is a right that requires no form of approval; it is applicable to children from the age of 14 years.[8] In

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Convention on the Rights of the Child (arts. 13 and 15); the Convention on the Rights of Persons with Disabilities (arts. 21, 29 and 30); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 24); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 26).

[4] See *Steel and Morris v. United Kingdom*, application No. 68416/01, judgment of 15 February 2005.

[5] Permanent Mission of Croatia to the United Nations Office at Geneva.

[6] Civic Space Initiative is a consortium composed of the International Centre for Not-for-Profit Law/ European Centre for Not-For-Profit Law, Article 19: International Centre against Censorship, CIVICUS: World Alliance for Citizen Participation and the World Movement for Democracy.

[7] Permanent Mission of El Salvador to the United Nations Office at Geneva.

[8] Permanent Mission of Montenegro to the United Nations Office at Geneva.

Finland, online notification is sufficient to register a civil society organization[9] and unregistered organizations operate freely, in line with recommendations of United Nations experts.

17. Systems for self-regulation or co-regulation have been developed or are being piloted in Norway and the Netherlands, providing for civil society organizations to work under the auspices of, and report to, umbrella organizations, which reduces the need for administrative resources and administrative costs and favours independence.[10]

18. In Mexico and Côte d'Ivoire, laws have been enacted that specifically protect human rights defenders, drawing on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, commonly known as the Declaration on Human Rights Defenders.[11] The commentary to the Declaration provides advice on how to implement the Declaration, giving examples of good practice relevant to the creation and maintenance of civil society space. Reports of the Special Rapporteur on the situation of human rights defenders (for example, A/HRC/31/55 and A/HRC/25/55) provide similarly useful guidance.

Freedom of peaceful assembly

19. A presumption that assemblies will be peaceful, explicitly established by law, as in Armenia and Romania, is recognized good practice,[12] as are laws that specify that everyone has the right to organize and participate in meetings and demonstrations without a permit and that no prior authorization is required; however, where the number of demonstrators is likely to exceed 50, notification may be required, as in the Republic of Moldova. Stewards appointed and trained by the organizers can guide and assist demonstrators (A/HRC/20/27).

Right to participate in public affairs

20. The constitutions of some countries, for example Ecuador, elaborate on the equal rights and opportunities for women and men, and the collective rights of indigenous peoples and nationalities, to participate in State institutions and political bodies.[13] Similar provisions relate to citizens' leading role in decision-making, planning and management of public affairs, popular control of State institutions and audit or scrutiny of government actions. Further, the protection of public freedoms is essential for elections to be safe, fair and credible (see A/68/299, para. 56).

2. Access to justice

21. Access to justice through an independent and effective judiciary, as well as access to national human rights institutions and to regional and international human rights mechanisms, is integral to a supportive legal framework for civil society actors. An

[9] Permanent Mission of Finland to the United Nations Office at Geneva. See also reports of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/20/27 and A/HRC/23/39).

[10] Civic Space Initiative.

[11] International Service for Human Rights.

[12] Commentary to the United Nations Declaration on Human Rights Defenders; Organization for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Panel of Experts on Freedom of Peaceful Assembly, *Guidelines on Freedom of Peaceful Assembly*, 2nd ed. (Warsaw, 2010).

[13] Ombudsman of Ecuador.

independent judiciary ensures the implementation of international human rights standards and inspires the confidence of all stakeholders.

22. Courts must be able to review, in a timely manner, sanctions by State authorities against civil society organizations to assess whether such measures are legitimate, necessary and proportionate. For instance, when the Registry of Associations refused to register an association monitoring the human rights of lesbian, gay, bisexual, transgender and intersex individuals on the grounds that it contravened public order, law and morals, the Constitutional Court of El Salvador reaffirmed the right to register of associations established for lawful purposes and ordered that the association's request for registration be considered regardless of the gender identity or sexual orientation of those concerned.[14] The Constitutional Court of Turkey examined a ban on accessing YouTube and Twitter, finding a violation of the right to freedom of information and expression.[15]

23. As national human rights institutions can contribute substantively to maintaining civil society space, their regulatory framework must be guaranteed by laws that fully comply with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) to ensure their independence and effective functioning.[16] In Australia[17] and the Netherlands,[18] for example, institutions have also been created to promote and protect the rights of specific groups, such as an ombudsman for children, persons with disabilities and indigenous communities, in addition to anti-discrimination monitoring bodies, all of which work closely with the national human rights institution.

24. Constitutional provisions may also explicitly guarantee the primacy of international law over national law and the right of individuals and associations to have recourse to international and regional bodies, mechanisms and courts. Moreover, they may provide for the implementation of decisions of international bodies.

25. Access to some regional mechanisms, including courts, can be an effective way to seek justice when the national judiciary is fragile or lacks independence. Modalities for civil society engagement with such mechanisms vary. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were cited by the Government of El Salvador,[19] among others, as affording easy and direct access for individuals and civil society groups wishing to bring cases and petitions for consideration, while Burkina Faso[20] noted civil society's engagement with the African Court for Human and Peoples' Rights and the African Commission on Human and Peoples' Rights.

B. Conducive public and political environment

26. Ensuring that public freedoms are guaranteed by law and upheld by institutions is certainly a foundation for an enabling environment for civil society to work freely and independently. But it must be complemented by a political culture that recognizes the value of civil society and encourages its engagement. In pursuance of target 17.17 of the Sustainable Development Goals, States should encourage and promote effective public,

[14] Permanent Mission of El Salvador to the United Nations Office at Geneva.
[15] Civic Space Initiative.
[16] The national human rights institutions of Austria, Azerbaijan and Guatemala, among others.
[17] Permanent Mission of Australia to the United Nations Office at Geneva.
[18] Permanent Mission of the Netherlands to the United Nations Office at Geneva.
[19] Permanent Mission of El Salvador to the United Nations Office at Geneva.
[20] Permanent Mission of Burkina Faso to the United Nations Office at Geneva.

public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships.

27. High-level messages, awards and honours send important signals to the public concerning the value of civil society's contributions, as do annual commemorative events such as the International Day of Democracy or Human Rights Day, among many others.

28. Changing terminology sends a powerful signal, as in the case of the Council of Europe, which acknowledged civil society's contribution by changing the consultative status of international non-governmental organizations (NGOs) to participatory status.

29. Nurturing a culture of volunteerism by enabling students to work with civil society organizations, as is the case of human rights organizations in Hungary, has the potential to increase young people's interest in civil society work.[21] Initiatives offered by the business community, including by law firms and networks, volunteer projects or working for part of a year with civil society are similarly supportive of an environment conducive to civil society activity.

30. States that have retained compulsory military service often provide for alternative service, including working for a civil society organization, demonstrating that working for civil society is an equally valid way for citizens to serve their country.

31. Addressing threats and attacks targeting civil society actors should be part of building a tolerant culture. For instance, the Government of Guatemala[22] has recognized specific protection needs and established units to analyse attacks on human rights defenders comprised of officials from the Interior Ministry, the Prosecutor's Office and the Human Rights Presidential Commission, in addition to civil society representatives, to provide a safe space for debate and explore effective preventive and protection options.

32. Use of derogatory terminology to delegitimize civil society actors, for instance labelling them "foreign agents", "moles" or "unpatriotic" in laws or in State-supported media, generally aims to deter criticism, discourage free expression, increase negative public opinion of civil society actors and distract attention from the issues at stake. States have an obligation to protect people from acts by private individuals or entities that would impair the enjoyment of freedom of opinion and expression.[23]

33. The Council of Europe signed a memorandum of understanding with several international NGOs and networks concerned with press freedom and launched an Internet platform to promote the protection of journalism and the safety of journalists. Efforts are ongoing within United Nations human rights mechanisms to expand the space for civil society and provide a safe and enabling environment for civil society within United Nations premises. And yet, civil society actors continue to face reprisals and intimidation because of their engagement with the United Nations, as described in the Secretary-General's report on reprisals (A/HRC/30/29) and as noted by the High Commissioner in his address to the Human Rights Council at its thirtieth session. Many human rights mechanisms have developed their own systems, or designated rapporteurs, to address cases of reprisal, including the human rights treaty bodies' guidelines against intimidation or reprisals ("San José Guidelines").

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[21] Civic Space Initiative.

[22] Permanent Mission of Guatemala to the United Nations Office at Geneva. See also the report of the United Nations High Commissioner for Human Rights on the activities of his office in Guatemala (A/HRC/28/3/Add.1 and Add.1/Corr.2).

[23] Human Rights Committee, general comment No. 34, para. 7; Promo-LEX.

C. Access to information

34. Access to information, which is part of freedom of expression, is especially important for civil society organizations in conducting their work effectively. The public needs access to diverse sources of information to become informed about issues that affect their lives, articulate concerns, engage constructively and contribute to solutions.[24] Finland's national human rights institution notes that Finnish legislation encourages transparency by considering information to be in the public domain unless a specific act designates the contrary.

35. The Constitution of South Africa provides that everyone has the right of access to any information held by the State and any information held by another person that is required for the exercise or protection of any rights. Similar language can be found in the 2013 Right to Access Information Act of Sierra Leone. In Brazil, legislation providing that information relating to human rights violations may not remain secret, and the decision to open up past State archives to the public, were cited as good examples.[25]

36. The introduction of webcast and remote participation of NGOs through the delivery of video messages at sessions of the Human Rights Council and the treaty bodies bring greater transparency and understanding of international human rights mechanisms and allow NGOs to obtain critical first-hand information. Meetings held between officials and civil society after such events can boost effective follow-up of observations and enrich processes for implementation of recommendations.

D. Participation in policy development, planning and decision-making

37. "Nothing about us without us" was a slogan commonly associated with the disability rights movement in the drafting process of the Convention on the Rights of Persons with Disabilities. Development outcomes have better chances to be sustainable when related decision-making is transparent and when diverse views and information are considered by decision makers. The involvement of diverse actors leads to more comprehensive representation of the population and enriches both the process and outcome.

1. Mutual benefits of collaboration

38. Various multi-stakeholder initiatives (e.g., alliances of Governments, national human rights institutions and civil society actors such as academic institutions, business enterprises and foundations, sometimes involving the United Nations or regional organizations) demonstrate the mutual benefits of collaboration by pooling expertise, opening up space for dialogue and providing financial backing to seek sustainable solutions to major issues.[26]

39. In Tunisia, joint endeavours by Government, business, trade unions and human rights actors created fresh approaches to countering terrorism and building and maintaining a peaceful society grounded in respect for the rule of law and human rights (see A/HRC/27/33, paras. 32-35). According to the Government of Cuba, ongoing consultations

[24] Amis des étrangers au Togo.
[25] Civic Space Initiative.
[26] United Nations Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, version 2.0 (Geneva, 2015).

on a wide range of issues engage all citizens in helping solve the country's most pressing problems, including complex economic reforms and rising prices.[27]

40. Countries in transition, in particular, are often dependent on expertise and services provided by civil society. The State may devolve humanitarian services to civil society and proactively engage it in processes to develop a new constitution, laws governing State institutions and elections, as well as in problem-solving and planning for the future.[28]

41. A State-civil society partnership plan involving El Salvador,[29] Guatemala and Honduras has been developed to improve the lives of young children and address humanitarian and social problems associated with unaccompanied children migrating to the United States.

42. State-civil society consultations regarding policy development for specific sectors, such as persons with disabilities, have resulted in the design and implementation of joint plans to advance the participation of persons with disabilities in public affairs and social integration, for example in Lithuania. In Ecuador, meetings with civil society groups and families of disappeared persons have led to positive policy recommendations, while consultations with groups representing persons of African descent resulted in commitments to work jointly to counter discrimination.[30]

43. The role of civil society in advancing social care, carrying out work in the context of humanitarian or other emergencies or accessing remote communities, sometimes in risky conditions, underscores the importance of joint design and planning of projects with Governments, as reported, for example, by the Government of Qatar.[31] Thus, in West Africa, cooperation among all concerned actors, including civil society, strengthened efforts to eradicate Ebola.[32] The involvement of organizations from the outset as partners with ministries in developing strategies and mechanisms for implementation and in the review and design and costing of projects contributes to greater effectiveness and relevance.

44. Civil society actors themselves constantly create space, crossing national and regional divides, uniting diaspora communities and organizing international and regional consultations to address common concerns,[33] and set up networks and coalitions for specific events or activities.[34] For example, in Colombia, dozens of families, with support from the Inter-Church Justice and Peace Commission and Peace Brigades International, joined forces to create a humanitarian space for the community in a particularly violent environment, working to protect civilians by prohibiting the entry of illegal armed groups.[35] Messages delivered by faith-based groups and religious leaders play an influential role within their respective communities, encouraging tolerance, cautioning against incitement to hatred and violence and addressing issues such as domestic violence. Leaders of different faiths united in their support for assistance to refugees and migrants contribute to expanding space for debate.[36]

45. Academic institutions can provide a safe environment in which diverse views are expressed and challenged and lend themselves well to partnerships with civil society that

[27] Permanent Mission of Cuba to the United Nations Office at Geneva.
[28] Permanent Mission of the Czech Republic to the United Nations Office at Geneva.
[29] Permanent Mission of El Salvador to the United Nations Office at Geneva.
[30] Ombudsman of Ecuador.
[31] Permanent Mission of Qatar to the United Nations Office at Geneva.
[32] United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women).
[33] Asia Democracy Network.
[34] Fiji Women's Rights Movement.
[35] Peace Brigades International.
[36] Persons Against Non-State Torture.

encourage creativity, combining theoretical and practical approaches.[37] Similarly, artists often contribute to social activism (see A/HRC/27/33, paras. 28-29). Free artistic expression can communicate beyond boundaries, provoke, challenge ideas and prejudices, expose injustice, human rights abuses or corruption and foster community interests and cooperation.

2. Consultation processes

46. States' formal and informal consultations with civil society have increased mutual understanding, built trust and enhanced the potential for collaboration.[38] Good practices regarding participatory processes are reflected in numerous United Nations reports, including those regarding participation in public affairs (A/HRC/30/26) and the right to participation of people living in extreme poverty (A/HRC/23/36). Predictability of processes, an inclusive approach and diverse means of communication, accompanied by realistic time frames, are prerequisites for meaningful consultation and debate. Making documents available in minority languages, for example, and in formats accessible to persons with disabilities enhances inclusiveness and facilitates participation.

47. In El Salvador, to enhance diversity and participation, institutional mechanisms facilitate consultation. These include the President's Economic and Social Council, which is a space for broad-based participation involving those who have traditionally been excluded or marginalized.

48. The Coordination Council of the Government of Kazakhstan holds two meetings per year on interaction with NGOs, with representatives of NGOs and relevant government officials. The Council develops instructions for the implementation of decisions on social issues discussed during its sessions.[39]

49. According to the Government, in the Russian Federation steps to regulate and facilitate interaction between civil society organizations and State institutions include the formation of a council of independent experts under the authority of the President to provide advice on human rights and propose measures to strengthen citizen participation in public affairs, as well as a government commission to coordinate activities of "open government" and facilitate interaction between the executive authority and civil society.[40]

50. Regional institutions, mechanisms and meetings provide invaluable opportunities for civil society engagement, particularly where national space is restricted. Regional meetings can assist cooperation among civil society actors facing similar challenges and provide support for civil society in countries in crisis, offering a safe environment in which to express solidarity and brainstorm on ways forward.[41]

51. Multiple online participation platforms and social media services enable the public at large to initiate or participate in discussions that concern them.[42] According to the Government, in Bahrain such services are provided for young people in particular.[43] In Finland, an innovative project was piloted to encourage consultation and address poor levels of participation in traditional political life. This consisted of forming a citizens'

[37] Right Livelihood Award Foundation.
[38] Permanent Mission of Switzerland to the United Nations Office at Geneva.
[39] Permanent Mission of Kazakhstan to the United Nations Office at Geneva.
[40] Permanent Mission of the Russian Federation to the United Nations Office at Geneva.
[41] Asia Democracy Network.
[42] Permanent Mission of Finland to the United Nations Office at Geneva.
[43] Permanent Mission of Bahrain to the United Nations Office at Geneva.

council with members selected at random and working mainly online, complemented by meetings.[44]

52. Municipal-level consultations can be facilitated by materials produced centrally and adapted for local use, together with assistance to local councils on working with civil society, including the media, and technical support to create local websites. Children's councils at the municipal level help children to participate in decision-making on issues that affect them and develop their understanding of political processes.[45]

53. As for other United Nations mechanisms, the work of human rights treaty bodies as well as of special procedures mandate holders is inconceivable without civil society input, which adds to the relevance and credibility of the conclusions and recommendations resulting from the experts' deliberations. Some States have taken the positive step of consulting with civil society in drafting their reports to the mechanisms, in addition to encouraging independent civil society submissions.

54. The universal periodic review, which requires consultation in the preparation of State reports and encourages broad-based input from civil society, has generally proved helpful in fostering dialogue between State institutions and diverse civil society sectors. Maintaining this dialogue is all the more valuable for the implementation of recommendations and to monitor progress.

55. In many countries, OHCHR field presences host or facilitate a wide range of partnerships as well as multi-stakeholder initiatives. They include a national platform for dialogue on business and human rights in Malawi and a thematic-based task force in Uruguay involving Government and civil society for follow-up to the universal periodic review and other human rights-related recommendations.

56. OHCHR and other United Nations entities working at the country and regional levels play a convening role, providing a safe and neutral environment for civil society actors to discuss and support endeavours to create networks with common interests[46] and facilitate dialogue between government officials and civil society actors. For example, recognizing civil society's crucial role in securing progress on the Millennium Development Goals, the United Nations Development Programme (UNDP) helped to create space at the global, regional and country levels to dialogue with government counterparts on how to improve policy and legal environments to stem HIV epidemics.[47]

57. Despite the many opportunities for civil society in United Nations forums, the different mechanisms, modalities and requirements may seem confusing or alienating to smaller organizations or online networks. In particular, the requirement to obtain consultative status with the Economic and Social Council to participate in most intergovernmental meetings, including the Human Rights Council, is seen as a barrier to participation in the work of the United Nations. Moreover, the deferral of a large number of NGO applications for consultative status, sometimes for years[48] and reportedly for arbitrary reasons, has deprived international debate of important civil society contributions.[49]

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[44] Human Rights Centre, Finland.

[45] Save the Children.

[46] United Nations Development Programme (UNDP); UN-Women.

[47] UNDP.

[48] International Dalit Solidarity Network.

[49] These and other challenges were the subject of a consultation convened by the Office of the Director-General of the United Nations Office at Geneva. See "The United Nations and civil society - 70 years working together: how do we make a difference from Geneva?", summary report, June 2015.

3. Drafting and review of legislation

58. In Lithuania[50] draft laws are posted online for comments and feedback. In Finland, consultation processes on draft legislation last a minimum of six weeks and result in a summary of the consultation process and comments received, which is presented to the legislature together with the bill. Citizens, with the support of 50,000 registered voters, can also propose changes to and repeal of laws or introduce new laws. Thus, a civil society-led campaign to legalize same-sex marriage in Finland garnered sufficient popular support, leading to parliamentary approval in 2014. The establishment of parliamentary joint committees on human rights with representation from civil society, as in Australia, can provide a more direct forum for civil society to engage with parliaments on legislative matters.[51]

59. Proactive measures to engage civil society and national human rights institutions in drafting processes can uncover gaps and missing information. In Austria, the national human rights institution took the lead in working with civil society organizations to draft the act to implement the country's ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[52]

60. International and regional human rights mechanisms can also play a critical role in improving legislative processes and texts. Thus, the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights advanced freedom of information legislation by holding extensive consultations with Governments and civil society prior to drafting a model law, which was eventually adopted by several African States.[53] More generally, many mechanisms provide useful guidance to ensure that legislation, in many areas, is compliant with international human rights norms and standards. For instance, the Special Rapporteur on the promotion and protection of human rights while countering terrorism has provided recommendations to ensure that laws on national security and counter-terrorism, money-laundering and incitement to hatred address legitimate concerns without encroaching on human rights and civil society activity (see, for example, A/HRC/16/51). The active participation of experts from civil society and national human rights institutions and academics in drafting and review processes helps to safeguard the protection of public freedoms.[54]

4. Policy monitoring and review

61. Ongoing policy monitoring is crucial to assess the performance of systems and processes and to adapt them as needed. It is important that consultations and monitoring be broadly based and not confined to habitual partners. Integrating new civil society organizations or grass-roots networks, irrespective of whether they are formally registered, can energize such processes.[55] Vigilance is required in State-civil society arrangements to preserve the independence of the latter.

62. In some cases, bodies composed of individuals from beneficiary communities are established to review government project performance. For example, in El Salvador, citizen oversight committees were established, and trained by the Institute for Municipal Development, to monitor project implementation and ensure transparency and

[50] Permanent Mission of Lithuania to the United Nations Office at Geneva.
[51] Permanent Mission of Australia to the United Nations Office at Geneva.
[52] Ombudsman Board of Austria.
[53] Civic Space Initiative. See also www.achpr.org/instruments/access-information.
[54] Civic Space Initiative.
[55] Comitato per la Promozione e Protezione dei Diritti Umani, Italy; Human Rights Consortium, Scotland.

accountability in the management of funds. The Government of Finland developed a national report reviewing past practices with a view to strengthening implementation of future democracy policy.[56]

63. Independent media regulatory bodies can help to assure pluralism and independence and guard against incitement to hatred and other abuses. This is the case of the independent media regulatory body of Tunisia, the Haute autorité indépendante de la communication audiovisuelle, which was established by the Constitution and bases its work on international human rights standards. In 2014, a civil society network to monitor incitement to hatred in the regional media was created in Tunisia, with support from OHCHR, in accordance with the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (see A/HCR/22/17/Add.4).

E. Long-term support and resources for civil society organizations[57]

64. States can create and maintain an enabling environment for civic activity by investing in the development of civil society, taking measures to build participation capacities, especially for marginalized voices, and facilitating access to diverse funding sources and technology. Empowering and strengthening civil society capacities contribute to a protective environment (A/HRC/31/55).

1. Education, awareness-raising and training

Human rights education

65. Equipping children and young people with information and skills to participate in public life contributes to the growth of civil society space.

66. Human rights education programmes and resources are produced by States, academic institutions, national human rights institutions and civil society, often in partnership. Benefits are optimized when teachers receive ongoing training in civic or human rights education and when the substantive curriculum is complemented by a school culture which encourages tolerance and values diversity.

67. Bearing in mind the receptiveness of very young children, investment in civic education should begin in primary school, with support from the home environment. In Finland, measures to encourage young people to become more engaged in societal affairs have involved strengthening education in democracy, equality and human rights and the introduction of a postgraduate degree in civil society.

68. Joint awareness campaigns by Governments, national human rights institutions and civil society can encourage political participation or engagement to combat racism and other forms of discrimination. An example is the anti-racism campaign in Australia. Creative campaigns using different media and championed by multiple sectors of society, including well-known personalities, can change public behaviours, combat stigmatization and create an environment where people feel that it is safe to speak out.

[56] Human Rights Centre, Finland.

[57] See the references to empowerment in the report of OHCHR on promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them (A/HRC/30/26) and the report of the Special Rapporteur on extreme poverty and human rights focusing on participation by people living in poverty (A/HRC/23/36).

Capacity-building

69. Recognizing the value of a free and dynamic civil society, several countries, including Croatia, the Czech Republic and Lithuania, have prioritized investment in its development and professionalization. Examples of training for civil society include specialist programmes in Burkina Faso, training of members of groups experiencing discrimination, including persons with disabilities,[58] on participation in public affairs and the inclusion of civil society actors in government delegations to international forums to expose them to international meetings and hone their advocacy and negotiation skills. OHCHR field presences also provide human rights training for civil society.

70. In Croatia, training raises the awareness of public officials working at the national and local levels of the importance of cooperation with civil society. Training programmes for public officials are often developed and co-presented with civil society representatives from different sectors and in some cases are linked with training on related international human rights standards and implementation of human rights recommendations. Empowering women and girls through programmes to strengthen their skills is critical. The presidential programme Ciudad Mujer, run by the Ministry of Social Inclusion of El Salvador, provides a safe and supportive environment where women can receive advice on human rights and training in business and technical support.

71. OHCHR field presences provide information and advice to civil society groups, organizing training sessions and seminars to strengthen their human rights advocacy and facilitate engagement with the United Nations human rights system.[59]

2. Funding

72. Predictability of core funding is fundamental for civil society organizations to work effectively and independently, undertake long-term planning and adapt to evolving situations.[60] As noted by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the right to freedom of association includes the ability to seek, receive and use resources – human, material and financial – from domestic, foreign and international sources (see A/HRC/23/39, para. 8).

73. Steps to stimulate the financial independence of civil society organizations include tax exemption and simpler taxation requirements, as in Croatia; reducing and simplifying financial reports and audits; and reduced bank interest rates and transfer costs,[61] with tax incentives for business and other donors, as in the Czech Republic.

74. Funding for civil society activities may be channelled via open and transparent processes from State or private lotteries and other games of chance, as in the Netherlands, Sweden and the United Kingdom of Great Britain and Northern Ireland; from foundations;[62] or through dedicated budget lines in respective ministries, as in Burkina Faso. Donor flexibility is important to ensure that funds are available for long-standing civil society partners and to create opportunities for informal groups and non-traditional actors.[63] The Government of Japan developed a system of bestowing legal personality on organizations that engage in specified non-profit activities to promote the development of

[58] International Disability Alliance.

[59] OHCHR, *Civil Society Space and the United Nations Human Rights System: A Practical Guide for Civil Society* (Geneva, n.d.).

[60] Open Dialog Foundation, Brussels; European Network of Political Foundations.

[61] OSCE/ODIHR.

[62] Civic Space Initiative.

[63] Freedom House.

citizens' free social action programmes as well as a system to provide certification for specified non-profit corporations that help to promote the public interest through appropriate business activities with fair management structures.[64]

75. Where no restrictions on the receipt of foreign funds apply to State institutions or businesses, the same should apply to civil society organizations. The law may provide requirements for the audit of accounts, carried out by an independent body.[65] Any restrictions on access by civil society organizations to funding should be prescribed by law, necessary in a democratic society and proportionate to the interest to be protected and applied on a case-by-case basis. Where concerns exist regarding national security, terrorism, money-laundering or similar serious matters, an assessment should be carried out by a competent independent body.

76. Almost all United Nations bodies, funds and agencies have some provision for grants and funds in support of civil society, including UN-Women, UNDP and OHCHR.[66]

3. Access to communications technologies and connectivity

77. A free, open, safe and secure Internet is indispensable to access diverse sources of data and analysis, to enable individuals to make well-informed decisions and to mobilize people to call for justice, equality, accountability and better respect for human rights (see A/HRC/17/27, para. 2). Increasingly, online information sharing and activism create a dynamic constituency in the campaign for change, particularly among young people, who often pioneer such initiatives. Clear messaging and simple action have created broad-based awareness, open discussions and campaigning capacity far beyond national borders.

78. Online communication and social media are increasingly used by States to reach out to young people and other sectors that may be underrepresented in more traditional forms of political debate and organization.

79. Many civil society actors have developed their own online space, sometimes creating formal networking structures. Communicating online with others to strategize and collaborate to achieve shared goals, exchange experiences or demonstrate solidarity serves to expand space and reduce isolation or marginalization, as experienced by environmental and land rights defenders or lesbian, gay, bisexual, transgender and intersex activists working in unsafe and undermining environments.[67]

80. The provision of information and communications technology (ICT) services to people living in remote or rural communities, who are likely to be more disadvantaged in terms of access than those in urban areas, helps to address technology gaps (see A/HRC/27/33, para. 22). Indigenous communities, refugees, migrants and internally displaced persons have benefited from free or low-cost ICT to assist their access to information and facilitate their participation in public life and decision-making processes affecting them.

81. Privacy, anonymity, encryption and digital security are central concerns for Internet users (A/HRC/29/32). Human rights principles must be fully integrated into surveillance initiatives to avoid mass surveillance or abuse of "targeted" surveillance measures and hacking of personal e-mail accounts and hijacking, blocking or closure of websites.

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[64] Permanent Mission of Japan to the United Nations Office at Geneva.
[65] OSCE/ODIHR.
[66] OHCHR, *Human Rights Funds, Grants and Fellowships: A Practical Guide for Civil Society* (Geneva, n.d.).
[67] Association for Progressive Communications.

III. Conclusion

82. **The exercise of public freedoms, which is quintessential for civic activity, is among the most important investment policies for prosperity, stability and peace. As the Secretary-General noted in his statement, made on 15 September 2015 on the occasion of the International Day of Democracy, progress and civic participation go hand in hand; a confident nation gives citizens a say and a role in the development of their country. Governments on their own do not have all the answers, and it is in their interest to dismantle barriers to the exercise of public freedoms to make it easier to unleash the creativity and ingenuity of civic activity to produce solutions.**

83. **The five key elements to create and maintain a safe and enabling environment for civil society are: a robust legal framework that is compliant with international standards as well as a strong national human rights protection system that safeguards public freedoms and ensures effective access to justice; a political environment conducive to civil society work; access to information; avenues for participation by civil society in decision-making processes; and long-term support and resources for civil society. By creating such conditions, Governments, the international community and other stakeholders will be better positioned to foster a climate of trust and cooperation in the interest of all people, at the local, national and global levels.**

IV. Recommendations

A. To Member States

84. **In the context of a supportive legal framework and access to justice, Member States should:**

(a) **Protect, by law and in practice, those rights that are necessary for civil society actors to operate, including the rights to freedom of opinion and expression and peaceful assembly and association and the right to participate in public affairs, including online;**

(b) **Review and repeal or amend all legal provisions that impede the free and independent work of civil society actors; ensure that all legislation affecting their ability to work complies with relevant international human rights laws and standards and with the Declaration on Human Rights Defenders; and use, among other tools, indicators on the exercise of public freedoms developed by OHCHR;**[68]

(c) **Allow unregistered associations to operate and provide for minimal legal and administrative provisions that favour simple notification to an independent administrative body and accessible to all at little or no cost;**

(d) **Ensure access to justice through an independent and effective judiciary, as well as access to national human rights institutions that conform to the Paris Principles and to regional and international human rights mechanisms;**

(e) **Introduce systems for co-regulation or self-regulation in areas where civic space issues can be managed by civil society organizations;**

[68] A list of illustrative indicators on freedom of opinion and expression and the right to participate in public affairs can be found in *Human Rights Indicators: A Guide to Measurement and Implementation* (New York and Geneva, OHCHR, 2012). See also www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx.

(f) Ensure that all counter-terrorism measures that have an impact on civil society comply with all relevant international human rights law and standards.

85. In the context of a conducive public and political environment, Member States should:

(a) Demonstrate high-level political support for the independence and diversity of civic activity through public statements and public information campaigns;

(b) Develop and implement national action plans for the implementation of the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, including commitments to promote and incentivize respect and support by business for civil society actors, domestically and abroad;

(c) Ensure accountability for any acts of intimidation or reprisal against civil society actors by ensuring prompt, thorough and impartial investigations and bringing perpetrators to justice;

(d) Develop or update a national policy framework and action plan to guide implementation of the recommendations formulated in the present report and of all international human rights law and standards relevant to civil society space.

86. In the context of access to information, Member States should:

(a) Enact clear laws, regulations and policies that guarantee the proactive disclosure of information held by public bodies, including those exercising public functions, and provide a general right to request and receive such information, subject only to clearly and narrowly defined exceptions in accordance with international human rights law and standards; guarantee the right to access information held by private bodies where it is essential to the exercise or protection of human rights; and provide a right to appeal to an independent body for any refusal to disclose information;

(b) Provide training for public officials on implementation of the right of access to information and disseminate information to the public on the right to access and the processes for achieving it.

87. In the context of participation in policy development, planning and decision-making, Member States should:

(a) Recognize the right to participation in public decision-making processes in legislation. This should include timely, clear, accurate and adequate information, with messages and questions that are easily understood; extensive dissemination of the outcome, accompanied by a description of the processes; the rationale for accepting or rejecting civil society proposals or input; opportunities for feedback and redress; and provision of adequate budgets for participation;

(b) Develop national action plans on engagement with civil society actors that oblige all public actors to consult with civil society in policy development and implementation;

(c) Integrate new forms of participation through the use of ICT and social media as a means to enable equal access to information and broad-based consultations;

(d) Systematically assess whether proposed legislative or policy reforms would have a negative impact on women or contain gender-specific elements or would affect specific sectors of the population;

(c) **Provide training and guidelines for public officials to support timely and effective consultation processes.**

88. **In the context of the provision of long-term support and resources for civil society organizations, Member States should:**

(a) **Recognizing that undue restrictions to funding is a violation of the right to freedom of association, ensure that civil society actors can seek, receive and use funding and other resources, whether domestic or foreign, without prior authorization or other undue impediments;[69] where no restrictions on the receipt of foreign funds apply to State institutions or businesses, the same should apply to civil society organizations;**

(b) **Provide core flexible funding to civil society organizations, with simplified procedures, and channel any funding for civil society activity via open and transparent processes;**

(c) **Within the framework of diligent financial practices, adopt tax exemptions for civil society organizations and tax incentives for donors and facilitate favourable banking terms that allow for cross-border transfers;**

(d) **Integrate human rights and civic education in curricula and training programmes at all levels.**

B. For regional and international entities

89. Regional and international entities should:

(a) **Ensure safe premises for civil society and provide advice in cases of threats, intimidation or reprisals;**

(b) **Throughout their activities and processes, provide for the effective participation of civil society, in conformity with international standards of non-discrimination, the freedoms of expression, association and peaceful assembly and the right to participate in public affairs;**

(c) **Expand the transparency, through such means as webcasting, of public meetings, including, for example, meetings of the Committee on Non-Governmental Organizations of the Economic and Social Council;**

(d) **Mainstream regular monitoring, review and public reporting on civic space issues and challenges across all entities.**

[69] See http://freeassembly.net/wp-content/uploads/2015/05/Funding-report-factsheet-final.pdf.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Human rights and the regulation of civilian acquisition, possession and use of firearms

Report of the United Nations High Commissioner for Human Rights

Summary

In its resolution 29/10, the Human Rights Council requested the United Nations High Commissioner for Human Rights to submit a report on the different ways in which the civilian acquisition, possession and use of firearms have been effectively regulated, with a view to assessing the contribution that such regulations make to the protection of human rights, in particular the right to life and security of person, and to identify the best practices that may guide States to further develop relevant national regulation. The present report is submitted pursuant to that request.

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I. Introduction

1. In its resolution 29/10, the Human Rights Council requested the United Nations High Commissioner for Human Rights to submit a report on the different ways in which the civilian acquisition, possession and use of firearms have been effectively regulated, with a view to assessing the contribution that such regulations make to the protection of human rights, in particular the right to life and security of person, and to identify the best practices that may guide States to further develop relevant national regulation.

2. To prepare the report, the Office of the United Nations High Commissioner for Human Rights (OHCHR) sought inputs from Member States, international and regional organizations, national human rights institutions and non-governmental organizations.[1] The report further draws on a diverse range of public sources, including international and regional instruments, the practice of United Nations human rights mechanisms and reports of regional and humanitarian organizations, civil society, scholars and practitioners.

3. In the present report the High Commissioner provides an overview of the impact of the misuse of firearms on the enjoyment of human rights. Placing the topic within a broader context of regulation of civilian access to firearms, he examines the different ways and means that the civilian acquisition, possession and use of firearms have been regulated at the international, regional and national levels, discussing, where relevant, their efficiency and elements of best practices. He concludes with a number of conclusions and recommendations.

4. There is no internationally agreed definition of the term "firearms".[2] "Firearms" encompasses both "small arms" and "light weapons"; however, no agreement exists on what types of arms fall into either subcategory. The principal reference regarding the scope of "small arms" and "light weapons" is the one provided in the 1997 report of the Panel of Governmental Experts on Small Arms (see A/52/298). Furthermore, instruments related to firearms refer to "civilian access to firearms", "civilian possession of firearms" and "civilian ownership of firearms" in a general sense and as shorthand for a more complex set of rules covering the acquisition, possession and use of firearms. In the present report, "civilian access" encompasses all three components: acquisition, possession and use.

[1] Contributions were received from Australia, Bahrain, Belgium, Burkina Faso, Burundi, Colombia, Ecuador, Egypt, El Salvador, Estonia, France, Greece, Honduras, Jamaica, Madagascar, Mauritius, Montenegro, Morocco, New Zealand, Paraguay, Peru, the Philippines, Romania, Senegal, Spain, Switzerland, Turkmenistan, the United Kingdom of Great Britain and Northern Ireland and Uruguay, the International Small Arms Control Standards Inter-Agency Support Unit, the Office of the Ombudsman of Montenegro and Women's International League for Peace and Freedom. All contributions are available on the OHCHR website.

[2] The term is used in Human Rights Council resolution 29/10 and in the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime and the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials. Other documents, including reports of United Nations bodies such as the Panel of Governmental Experts on Small Arms, and regional instruments, such as agreements adopted by the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC), refer to "small arms and light weapons".

II. Impact of the misuse of firearms on the enjoyment of human rights

5. It has been widely recognized that firearms are the main tool used to commit acts of violence and crime (A/HRC/14/24/Add.7). The Secretary-General has described them as "weapons of mass destruction" (see A/54/2000, para. 238). Firearms are more widely used than any other weapon.[3] While the rate varies from region to region, recent estimates suggest that approximately 41-46 per cent of all homicides involve firearms.[4] About 86 per cent of homicides using firearms are deaths in non-conflict settings.[5] These estimates do not factor in suicides committed with firearms or deaths by firearms in conflict settings.[6]

6. Assessments of violence committed with the use of firearms are often based on rates of homicide and recorded conflict deaths and do not typically include the non-fatal consequences of firearm use. To fill this gap, the Secretariat of the Geneva Declaration on Armed Violence and Development has undertaken research and found that at least 754,000 individuals are victims of non-fatal firearms injuries every year.[7] Other negative and long-term consequences of firearms that are less documented include non-physical harm such as psychological trauma and stress, the effects of which can be felt even when a firearm is only used to threaten.[8] In addition, there is a growing awareness of the economic costs of armed violence.[9] One study assessed the economic impact of violence containment on the world economy at $9.46 trillion or 11 per cent of gross world product.[10] These figures show that access to firearms and their unlawful use pose a risk of significant harm to human life in various ways.

7. The submissions received from States and other stakeholders following calls for contributions to the present report helped build a better understanding of the direct and indirect impact of firearms on human rights. The submissions confirm that firearms lead to a broad range of acts which can affect a wide variety of human rights. They highlight the types of crime and violence in which firearms have been used, including homicides,[11] serious injuries, including those causing disability,[12] rape and other sexual violence, robbery, theft, assault, abduction, torture, forced displacement and domestic violence.[13] Some States reported that the majority of criminal violence on their territory was committed

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[3] United Nations Office on Drugs and Crime (UNODC), *Global Study on Homicide* (Vienna, 2013), pp. 15-16.

[4] Ibid., pp. 15-16. UNODC estimates 177,000 deaths in 2012, while the secretariat of the Geneva Declaration on Armed Violence and Development, in *Global Burden of Armed Violence 2015: Every Body Counts*, estimated an annual average of nearly 197,000 deaths for the period 2007-2012.

[5] Geneva Declaration, *Global Burden*, chap. 2.

[6] Neither the UNODC nor the Geneva Declaration study includes "self-inflicted death" committed with a firearm in their calculations. According to the World Health Organization (WHO), in 2012 alone there were some 800,000 suicides, with firearms accounting for up to 46 per cent of them in some parts of the world. See www.smallarmssurvey.org/about-us/highlights/highlights-20 .4/m44-firearm-suicides.html and WHO, *Preventing Suicide: A Global Imperative* (Geneva, 2014), p. 24.

[7] Geneva Declaration, *Global Burden*, p. 73. See also www.globalburdenofinjuries.org and A. Alvazzi del Frate, "a matter of survival: non-lethal firearm violence", in *Small Arms Survey 2012: Moving Targets* (Geneva, 2012), pp. 78-105.

[8] Geneva Declaration, *Global Burden*, p. 91.

[9] Ibid., chap. 5.

[10] Institute for Economics and Peace, *The Economic Cost of Violence Containment* (2014).

[11] France.

[12] Peru and Estonia.

[13] Ecuador and Burkina Faso.

with firearms.[14] Women and children were found frequently to be victims of firearm-related violence.[15]

8. Other submissions highlighted the dramatic consequences of the widespread availability and misuse of firearms, including changing the fates of individuals and even entire communities,[16] engendering a general sense of insecurity and fear, exacerbating crimes[17] and encouraging individuals to arm themselves for self-defence and defence of their property.[18] Daily life lived with the fear and threat of violence from firearms also has psychological consequences such as trauma[19] and insecurity.[20] Field surveys in one State showed that more than half the population was living in a state of fear of being attacked by a person with a gun.[21]

9. Many States agreed that deaths and injuries resulting from firearm-related violence were a major human rights issue.[22] It was stated that firearms were "the primary medium" of human rights violations and abuses[23] and that violence was often encouraged by the ready availability and abundance of firearms.[24] States argued that the listed forms of violence and crime, and the harm they caused, often constituted violations of the right to life, security[25] and physical integrity and of the rights to liberty and protection from torture,[26] among others.[27] One State pointedly stated that the misuse of firearms affected the entire spectrum of human rights.[28]

10. Economic, social and cultural rights affected by firearms include the rights to health,[29] education, an adequate standard of living and social security and the right to participate in the cultural life of the community (see E/CN.4/Sub.2/2003/29, para. 13). There is also a concern that insecurity caused by firearm-induced violence leads to the diversion of investment, a negative impact on productive assets such as tourism and family disintegration.[30] Insecurity has been identified as a main cause of poverty.[31] Moreover, States asserted that the misuse and availability of firearms could have an indirect and continued impact on access to the right to an adequate standard of living[32] as a result of the economic burden on families of those injured and killed.[33] The sheer impact of firearms on

[14] Honduras, Jamaica and Peru.
[15] Burundi.
[16] Estonia.
[17] Philippines.
[18] Burkina Faso and Women's International League for Peace and Freedom, regarding Cameroon.
[19] Estonia.
[20] Burundi.
[21] Burkina Faso.
[22] Burkina Faso, Burundi, Ecuador, Estonia, Honduras, Jamaica, Madagascar, Mauritius, Montenegro, Peru, the Philippines and Senegal. See also the reports of the Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons (E/CN.4/Sub.2/2002/39, E/CN.4/Sub.2/2003/29, E/CN.4/Sub.2/2004/37 and Add.1 and A/HRC/Sub.1/58/27).
[23] Peru.
[24] Honduras.
[25] Bahrain, Burundi, Ecuador, Egypt, Montenegro and Morocco; Office of the Ombudsman of Montenegro.
[26] Jamaica.
[27] Peru.
[28] Estonia.
[29] Estonia, Honduras, Peru and the Philippines.
[30] Honduras.
[31] Madagascar.
[32] Burundi.
[33] Burundi.

individuals and communities is of such scale and complexity that a human rights lens is warranted in examining it.

III. Regulation of civilian access to firearms and its legal parameters

11. The present section describes steps taken within the United Nations in relation to small arms and provides an overview of relevant international human rights law and related findings of international and regional human rights mechanisms and of sectoral regional agreements and instruments as well as national legislation on the civilian access to firearms. Summarizing the different ways and means of regulating civilian acquisition, possession and use of firearms also helps to identify common standards and best practices in this area.

A. Setting the context

12. In 2001, the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects adopted a programme of action in which it expressed grave concern about the excessive accumulation and uncontrolled spread of firearms.[34] On the demand side, with respect to civilian access to firearms, international debates have so far been premised on the recognition that firearms possession on its own is not the cause of violence; rather, it is their irresponsible and illegal use that increases their lethality and raises concern. Driving factors behind the concern over firearms proliferation in private hands include a growing awareness of the harms and risks generated by uncontrolled and excessive availability of firearms, the rise in the number of intra-State conflicts, violence in non-conflict settings with firearms used as the weapons of choice[35] and the privatization of security provision.[36] The majority of firearm users are civilians, who are also the primary victims of firearm violence. According to a 2007 estimate, 650 million firearms out of the estimated 875 million in existence were owned by civilians.[37]

13. In its report the Panel of Governmental Experts on Small Arms identified regulation of civilian access to firearms as key to addressing transborder illicit flows of firearms. Diversion of privately owned firearms that have been stolen or lost is one of the major sources of supply. Stopping diversion requires tracking legal possession and trade of firearms and ensuring greater accountability of legal firearm owners for their responsible use. For international and national strategies aimed at curbing illicit trade to be effective, measures need to be in place to track privately owned firearms. To that end, the Panel of Governmental Experts stressed that measures to control civilian possession of firearms at the national level should be complemented by concerted international action to combat illicit circulation of firearms.[38] It recommended that all States should determine in their

[34] Meanwhile, international normative and policy efforts have also achieved significant progress in terms of standard-setting on the arms supplier side in the areas of arms transfers and combating illicit circulation. The entry into force of the landmark Arms Trade Treaty in 2014 is one example.

[35] Estimates suggest that only a small proportion (approximately 13 per cent) of all deaths by firearm occur during conflicts. See Geneva Declaration, *Global Burden*, chap. 2.

[36] On the relationship between private security firms and protection of the right to life, see the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/29/37/Add.1).

[37] According to the Small Arms Survey, gangs own 2 million-10 million firearms, private security companies own 1.7 million-3.7 million and non-State armed groups own 1.1 million-1.8 million. *Research Notes: Armed Actors*, No. 9, September 2011.

[38] Despite the absence of a commitment in the Programme of Action to regulate the issue of civilian possession of firearms at the national level, at the Third Biennial Meeting of States to Consider the

national laws which arms are permitted for civilian possession and the conditions under which they can be used; that they have adequate laws, regulations and administrative procedures to exercise effective control over the legal possession of small arms and light weapons and over their transfer in order to prevent illicit trafficking; and that States emerging from conflict should, as soon as practicable, impose and enforce licensing requirements for all privately owned firearms on their territory (see A/53/398, para. 80).

B. International human rights law

1. Due diligence obligations to protect human rights

14. Human rights law requires States to protect human rights with due diligence, which entails the obligations to prevent and sanction harmful private activity that impairs the enjoyment of human rights. In particular, the Human Rights Committee, in its general comment No. 31 (2004) on the nature of the legal obligations on States parties to the International Covenant on Civil and Political Rights, stated that those obligations would only be fully discharged if individuals were protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they were amenable to application between private persons or entities. The Committee further noted that there might be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities (see also E/C.12/1994/42, para. 102).

15. For example, the right not to have one's life taken arbitrarily implies an obligation on the part of States parties to take reasonable steps to prevent situations that could result in the violation of the right to life.[40] Accordingly, this right generates the positive obligation to prevent killing by private individuals and non-State actors in certain situations. It also implies putting in place effective criminal law provisions to deter commission of offences.[41] The State is thus under an obligation to take measures to prevent known, real and immediate risks to the life of an identified individual or individuals from the criminal acts of a third party.[42] Finally, a broad approach to defining the content of the due diligence obligation in relation to the right to life also encompasses "access to the conditions that guarantee a dignified existence".[43]

2. Due diligence obligations of States and civilian access to firearms

16. United Nations human rights bodies and mechanisms have examined and further articulated the human rights implications of the use of firearms by private entities, including for the due diligence obligations of States.

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implementation of the Programme of Action, held in 2008, the issue of civilian possession of small arms and light weapons was considered by some States to be important to the implementation of the Programme of Action (see A/CONF.192/BMS/2008/3, outcome document, para. 28 (g)).

[40] Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, para. 172.

[41] European Court of Human Rights, *Akkoç v. Turkey*, judgment of 10 October 2000, paras. 77-78.

[42] Ibid.

[43] Inter-American Court of Human Rights, *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, judgment of 19 November 1999, para. 144.

Charter-based human rights bodies

17. Charter-based United Nations human rights bodies have referred to civilian access to firearms for the past 10 years.[9] The Sub-Commission on the Promotion and Protection of Human Rights appointed a Special Rapporteur in 2003 to undertake a comprehensive study on the prevention of human rights violations committed with small arms and light weapons,[10] resulting in draft principles on the prevention of human rights violations committed with small arms which were endorsed by the Sub-Commission and annexed to its resolution 2006/23.

18. The draft principles systematically address States' obligations to prevent human rights abuses committed by private actors. They acknowledge the need to regulate private access to firearms in the right to life, liberty and security of persons and in the need to promote the human rights of all persons by preventing foreseeable small arms violence through appropriate measures to regulate small arms possession and use by private actors.[11] The list of measures to prevent small arms violence by private actors includes, inter alia, licensing requirements to prevent the possession of arms by persons who are at risk of misusing them; authorizing the possession of small arms for specific purposes only and their use strictly for the purpose for which they are authorized; and the periodic renewal of licences.

19. The draft principles further stipulate that before issuing a licence, Governments shall require training in the proper use of small arms and take into consideration, as a minimum, the applicant's age and mental fitness, the purpose for which the firearm is intended, and a prior record of criminal activity, misuse of firearms or acts of domestic violence. The draft principles also call upon States to exercise controls over the manufacturing of small arms; mark firearms for the purpose of identifying them and tracing their movements; implement legislative or other measures to ensure the investigation and prosecution of persons responsible for the illegal manufacture, possession, stockpiling or transfer of small arms; and criminalize the misuse of small arms and their unlawful possession as well as acts of domestic violence.

20. In resolution 2006/23, the Sub-Commission also stressed that the protection of human rights must be central to the development of further principles and norms regarding the availability, transfer and misuse of small arms and light weapons. It underlined the due diligence obligation of States to reduce small arms violence by private actors, including the obligation to prevent firearms from getting into the hands of those who were likely to misuse them. To that end, States were encouraged to adopt effective measures, such as laws and policies, regarding the possession, transfer and use of small arms and light weapons that complied with the principles of international human rights and international humanitarian law. It also encouraged United Nations bodies, human rights monitors in the field and non-governmental organizations to report specifically on any human rights violations committed with firearms.

21. The Special Rapporteur on violence against women, its causes and consequences has also discussed the topic in some detail in the context of the protection of women's rights. In 1996, the Special Rapporteur addressed civilian possession of firearms in a study dedicated

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[9] Including most recently in 2014 and 2015 by the Human Rights Council in resolutions 26/16 and 29/10.

[10] E/CN.4/Sub.2/2003/39, E/CN.4/Sub.2/2003/29, E/CN.4/Sub.2/2004/37/Add.1 and A/HRC/Sub.1/58/27.

[11] The draft principles refer in this context to paragraph 5 of Economic and Social Council resolution 1997/28 and resolution 9 adopted by the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

to identifying a framework for comprehensive legislation on domestic violence (see E/CN.4/1996/53/Add.2, para. 38). The Special Rapporteur recommended including a provision on automatic revocation of firearm licences in such legislation (see E/CN.4/1999/68, para. 57).

22. The Special Rapporteur has examined concrete cases where firearms have caused or exacerbated human rights abuses (see A/HRC/17/26/Add.5 and Corr.1, para. 10 and A/HRC/20/16, para. 68) and where the possession and use of arms (see E/CN.4/2005/72/Add.2, para. 80) as well as their proliferation (see E/CN.4/2005/72/Add.3, para. 10) were factors that generated and sustained violence and gender-based discrimination (see A/HRC/29/27/Add.1, para. 30). While women suffered "hostile gun displays" as a form of interpersonal violence (see A/HRC/17/26/Add.5 and Corr.1, para. 10), easy accessibility of firearms also contributed to suicides among females (see A/HRC/4/34/Add.2, paras. 77-79). The Special Rapporteur further examined the issue of firearms in the context of cultural family practices. Looking into forms of masculinity, she noted that "unless there is public education and campaigns to try and counter the negative images of violent men as ideals for a society, the heroic male stereotype in many societies may still be the one carrying the gun. Such an ideal has serious consequences for women (see E/CN.4/2002/83, para. 108)". She further noted that other, seemingly non-gendered practices, such as a gun culture, also had consequences for gender-based violence (see E/CN.4/1999/68/Add.2, para. 48).

23. In all these cases, the Special Rapporteur recommended that the use of firearms should be regulated and their misuse criminalized as measures to end impunity for violence against women. In addition, remedies for victims of domestic violence should include enhancing firearms control measures by ensuring an adequate background-check system to capture all relevant elements that determine an individual's suitability for gun possession; periodic review of licences to determine continued suitability; clear gun removal policies when intervening in domestic violence cases, including the possibility of removing guns after the first notification of a domestic dispute; and the criminalization of the illegal sale of firearms and of failure to report stolen guns (A/HRC/17/26/Add.5).

24. Finally, the issue of civilian access to firearms has been raised within the framework of the universal periodic review (see A/HRC/30/12, paras. 176.230-176.233 and A/HRC/30/11, paras. 125.40 and 125.43). In addition to expressing concern over firearm-related deaths and injuries, States recommended general measures to eliminate violence committed using a firearm and to tackle the proliferation of firearms, as well as specific steps such as expanding personal background checks for all persons seeking to acquire a firearm, enhancing oversight over private security companies and putting in place stronger safeguards to protect the safety of individuals.

Treaty-based United Nations human rights bodies

25. Treaty bodies have addressed three issues related to the use of firearms by private entities: the negative impact of firearms on human rights; the need to regulate civilian access to firearms; and the human rights parameters of firearm transfers.

Negative impact of firearms on human rights

26. The Committee on the Rights of the Child has stated in its general comment No. 9 (2006) on the rights of children with disabilities that the availability and accessibility of small arms and light weapons is a major cause of disability. The impact of violence committed with the use of firearms has also been considered by the Human Rights Committee in the context of the protection of minorities, women and children, with reference not only to the right to life, but also to the right to equality and non-discrimination (see CCPR/C/USA/CO/4, para. 10). The Committee on the Elimination of Discrimination

against Women, in its general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations similarly expressed concern that the proliferation of firearms has had a direct or indirect effect on women as victims of conflict-related gender-based violence, as victims of domestic violence and also as protesters or actors in resistance movements.

Need to regulate civilian access to firearms

27. Treaty bodies have emphasized prevention and interpreted the content of the general obligation to reduce harm and risks to individuals associated with the proliferation of firearms and their potential misuse. For instance, the Human Rights Committee has found that the obligation to effectively protect also requires efforts to curb violence that include the continued pursuit of legislation requiring background checks for all private firearm transfers (see CCPR/C/USA/CO/4, para. 10).

28. The Committee has also stated that the protection of the right to liberty and security of person as provided in article 9 of the International Covenant on Civil and Political Rights involved measures of control over civilian ownership of firearms (see CCPR/C/79/Add.50, para. 17).[46] The Committee has taken this provision to mean that the protection of individuals from foreseeable threats to life or bodily integrity includes the duty of States to protect their populations against the risks posed by excessive availability of firearms.[47] The significant number of small arms and light weapons has also been identified as a risk to the safety of populations, particularly children (see CRC/C/OPAC/BIH/CO/1, para. 23). The Committee on Economic, Social and Cultural Rights, concerned at the high number of suicides in a particular State, examined the easy accessibility of firearms in its analysis of the scope of the right to the enjoyment of the highest attainable standard of physical and mental health in that country. The Committee recommended that the State take measures to restrict access to firearms (see E/C.12/CHE/CO/2-3, para. 19).

29. The Committee on the Elimination of Discrimination against Women has read the regulation of civilian possession of firearms into due diligence obligations stemming from article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. To discharge its obligation of due diligence, a State was urged to enact legislation that strictly regulated the possession of small arms and to sanction violations (see CEDAW/C/PAK/CO/4, para. 14 (d)). The Committee held that robust and effective regulation of the arms trade, in addition to appropriate control over the circulation of existing and often illicit conventional arms, including small arms, to prevent their use to commit or facilitate serious acts of gender-based violence was needed (ibid., para. 29; see also CCPR/C/PHL/CO/4, para. 14).

30. Similarly, the Committee on the Rights of the Child has linked measures to prevent proliferation of firearms with the obligation to protect the right to life (see CCPR/C/PHL/CO/4, para. 14) as well as the right of children to safety and security (see CRC/C/OPAC/LKA/CO/1, paras. 44-45). The problem of firearms has also been raised in the context of the right of the child to freedom from all forms of violence. While characterizing conditions where guns and other weapons were easily available as harmful environments for children, the Committee, in its general comment No. 13 (2011) on the right of the child to freedom from all forms of violence, reaffirmed that States had the duty to incorporate the protection of children into legislative, administrative, social and educational measures and at all stages of intervention, from prevention to recovery and reintegration.

[46] See also general comment No. 35 (2014) on article 19 (liberty and security of person), para. 9.

[47] Ibid.

31. The Committee against Torture has also expressed the view that strict national firearm control measures are necessary. In particular, it has approached the issue by looking at the regulation of firearm users. The Committee, examining irregularities in the approval of firearm licences whereby licences have allegedly been granted indiscriminately and the firearms obtained therewith used to commit offences prohibited by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended that a State should strengthen the administrative measures necessary to control the indiscriminate issuance of firearms licences (see CAT/C/GUY/CO/1, para. 7). The Committee on the Rights of the Child has expressed a similar view. Concerned about the proliferation of firearms in a State, and particularly about the high proportion of children carrying them (see CRC/C/OPAC/BGD/CO/1, para. 23),[48] the Committee considered that it was imperative to take all necessary measures to ensure that children did not have access to small arms and/or light weapons and that those already in possession of weapons be disarmed (ibid., para. 24).

32. In view of the continuing high numbers of gun-related deaths and injuries in a State, the Human Rights Committee enjoined it to take all necessary measures to abide by its obligation to effectively protect the right to life and to curb gun violence, including through the continued pursuit of legislation requiring background checks for all private firearm transfers in order to prevent possession of arms by persons recognized as prohibited individuals under the law; ensure strict enforcement of the relevant domestic legislation;[49] and review the "stand your ground" laws to remove far-reaching immunity and ensure strict adherence to the principles of necessity and proportionality when using deadly force in self-defence (see CCPR/C/USA/CO/4, para. 10).

33. The Committee on the Rights of the Child expressed appreciation for States' efforts to collect small arms and light weapons in the hands of civilians (see CRC/C/OPAC/BIH/CO/1, para. 24 (a) and (b) and CRC/C/OPAC/MNE/CO/1, para. 24) as well as measures aimed at raising awareness on the risks and dangers of firearms, which were elements of effective national arms control. The Human Rights Committee has emphasized the imperative of weapon collection schemes in post-conflict settings (see CCPR/C/AGO/CO/1, para. 12). Other recommendations made by the Committee on the Rights of the Child regarding measures to curb the proliferation of private possession of firearms have included international and regional cooperation with respect to the control of and eradication of surplus small arms and light weapons, including those in the possession of the civilian population (see CRC/C/OPAC/BIH/CO/1, para. 24 (a) and (b)). As a measure of prevention, the Committee, in general comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child, also recommended that States strictly control firearms in discharging its obligation to prevent interpersonal violence. It further stated that one way to exercise strict governmental control was by imposing controls on the illicit sale of firearms complemented by a policy to eradicate and control the informal availability of firearms (see CRC/C/SLV/CO/3-4, para. 32 and CRC/C/OPAC/LKA/CO/1, paras. 44-45).

34. In examining the information provided by a State regarding the non-proliferation of small arms, the Human Rights Committee expressed regret that the statistical data provided on the number of crimes committed involving small arms, investigations undertaken, prosecutions made, sanctions imposed on those responsible and measures taken to protect its population against the insecurity caused by small arms were insufficient. The Committee recommended that the State strengthen measures to collect small arms held by the

[48] On the general question of the overproliferation of small arms in general, see CRC/C/SDN/CO/3-4, paras. 74-75.

[49] For example, the Domestic Violence Offender Gun Ban of 1996 (the Lautenberg Amendment).

population and to reduce insecurity in its territory and further consider reinforcing its legislation in order to combat illegal possession and use of small arms (see CCPR/C/AGO/CO/1, para. 12). The Committee requested information from another State on the number of victims of gun violence and on the steps taken to protect human rights from risks associated with the proliferation of firearms (see CCPR/C/USA/Q/4, para. 9).

Human rights parameters of firearms transfers

35. Treaty bodies have also developed the human rights parameters of firearms transfers, thereby acknowledging the human rights dimension of the illicit and unregulated trade in firearms. The Committee on the Rights of the Child, for example, recommended the application of criteria based on the Convention on the Rights of the Child to the transfer of firearms. These include requiring regular public reporting on the export of firearms; a prohibition on exporting to countries where children are known to have been or are involved in armed conflict (see CRC/C/OPAC/UKR/CO/1, paras. 25-26);[50] application of general human rights criteria; an assessment of the impact that the export of weapons export has on the rights of children (ibid.); integration of a child-rights perspective in measures taken to prevent arms trafficking (see CRC/C/OPAC/BGD/CO/1, para. 24); adherence to the international framework on the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (see CRC/C/OPAC/EGY/CO/1, para. 32); and criminalization of illicit activities related to the manufacturing and trafficking of firearms (ibid.).[51]

3. Regional human rights bodies

36. The Inter-American Commission on Human Rights addressed the issue of the availability of firearms in its thematic report on security and its relationship to human rights,[52] in which the Commission provided an overview of the situation and proposed recommendations designed to assist member States in implementing their human rights obligations in this area. The Commission noted that the large numbers of firearms in private hands had contributed to violence against women, children, adolescents, indigenous populations and Afro-descendants. To address those complex problems, the Commission recommended that effective measures be adopted to guard against actions by private parties that threatened the right to life by addressing the factors that enabled violent behaviour to breed and multiply within society, especially those that controlled and reduced the number of firearms in private hands. The obligation to protect human rights also required regulating the activities of private security firms, in particular by establishing a public record of the weaponry carried by those firms and requiring that their employees be certified by the competent State agencies to show that they are qualified for their employment and that they have the physical and psychological aptitude and training (especially in the use of firearms) necessary to perform these types of tasks.

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[50] See also in this regard CRC/C/OPAC/MNE/CO/1, para. 25; CRC/C/OPAC/BEL/CO/1, para. 20-21; CRC/C/OPAC/KGZ/CO/1, paras. 8-9; CRC/C/OPAC/MDA/CO/1, paras. 14-15; CRC/C/OPAC/USA/CO/2, para. 41; CRC/C/OPAC/EGY/CO/1, para. 32; CRC/C/OPAC/BLR/CO/1, paras. 20-21; CRC/C/OPAC/MKD/CO/1, para. 19; CRC/C/OPAC/CAN/CO/1, para. 14; CRC/C/OPAC/AUS/CO/1, para. 28; CRC/C/OPAC/BIH/CO/1, para. 24; CRC/C/OPAC/KOR/CO/1, paras. 21, 22; CRC/C/ITA/CO/3-4, para. 72; CRC/C/OPAC/TUN/CO/1, paras. 17-18; CRC/C/OPAC/CZE/CO/1, para. 19; and CRC/C/OPAC/GRC/CO/1, para. 18.

[51] See also in this regard CRC/C/OPAC/BLR/CO/1, paras. 20-21; CRC/C/OPAC/MKD/CO/1, para. 19; and CRC/C/OPAC/BIH/CO/1, para. 24.

[52] Inter-American Commission on Human Rights. *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, Doc. 57, 31 December 2009, para. 218.

C. Regional agreements and instruments regulating civilian access to firearms

37. A large number of binding and non-binding regional agreements and instruments have been developed to address the civilian acquisition, possession and use of firearms. The following texts have been developed in Africa: Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (2000); Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region (2001); Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, their Ammunition and other Related Materials (2001); Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region, the Horn of Africa and Bordering States (2004); and Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (2010).

38. In the Americas, the Andean Plan to Prevent, Combat and Eradicate Illicit Trade in Small Arms and Light Weapons in all its Aspects (2003) was developed. The European Union adopted Directive 91/477/EEC on control of the acquisition and possession of weapons (1991) and its amending Directive 2008/51/EC. In the South Pacific, the Legal Framework for a Common Approach to Weapons Control, also known as Nadi Framework (2000), was developed. In regions that have no common legal framework on firearms, model legislation has been developed to assist and inform national efforts to regulate, among other things, possession of firearms by civilians. Notable in this regard are the Arab Model Law on Weapons, Ammunitions, Explosives and Hazardous Material (2002) and the Commonwealth of Independent States Model Law on Weapons (1997).[53]

39. The statements of purpose provided in the preambles to these regional agreements and instruments constitute a helpful guide to the rationale behind the regulation of civilian access to firearms. For example, in the preamble to Directive 91/477/EEC, the Council of the European Communities asserts that the rules contained in the Directive will generate mutual confidence in the field of the protection of the safety of persons. In its convention ECOWAS refers to the excessive and destabilizing accumulation of small arms and light weapons as well as their proliferation as the context for regional regulation. In the Nairobi Protocol the Ministers of Foreign Affairs of the participating States addressed the well-being of the population in the subregion and their right to live in peace. In the Nadi Framework the signatories established as the founding principle the possession and use of firearms as a privilege that is conditional on the overriding need to ensure public safety. In the preamble to the Central African Convention the signatory States recall, among other things, the Convention on the Elimination of All Forms of Discrimination against Women and Security Council resolutions on children and armed conflict. These references confirm the link between firearms control and human rights and support the approach adopted by the treaty bodies.

40. A comparative analysis of these normative instruments reveals common elements with regard to the regulation of civilian access to firearms: the requirement of national regulations stipulating conditions under which civilians may acquire, possess and use firearms; the requirement to establish sanctions for offences involving the misuse or unlawful possession of firearms; and international cooperation between member States in areas regulated by the respective instrument. All except the Bamako Declaration and the Andean Plan prohibit unrestricted access to firearms by civilians, while only the SADC

[53] See www.iacis.ru/upload/iblock/ceb/057.pdf.

Protocol, the ECOWAS Convention, the Nairobi Protocol and the Central African Convention ban civilians from accessing automatic or semiautomatic firearms.

41. All but the Bamako Declaration and the Andean Plan envisage the following normative elements: the establishment of a licensing system for the civilian acquisition, possession and use of firearms; record keeping; marking and tracing of firearms; regulations restricting the right of the owner to relinquish control, use or possession of a firearm; and monitoring and auditing of licences. The ECOWAS Convention and the Central African Convention require member States to impose a limit on the number of weapons a licence may cover. Among notable innovative practices, the Central African Convention envisages a subregional electronic database that will help verify the validity of licences granted at the national level for the possession of, carrying, use and trade in firearms by civilians.

42. Taken together, the African regional instruments commit 46 States to robust regulation of the civilian acquisition, possession and use of firearms. European Directive 91/477/EEC commits 27 States to a strong firearms control framework, while the Nadi Framework and the Andean Plan commit 11 States. Together, these instruments cover four regions and 84 countries. The common standards across regions not only help to clarify elements of best practices, but also contribute to the consolidation of minimum standards in the area, including with regard to the protection of human rights.

43. The Coordinating Action on Small Arms mechanism established by the Secretary-General has developed guidance on appropriate control measures, building on the standards described above, best practice guidelines and model regulations that have been developed at the regional and subregional levels. The standards, reflected in International Small Arms Control Standard 03.30 on national regulation of civilian access to small arms and light weapons, provide comprehensive guidance on the acquisition, possession and use of firearms.[54]

D. National legislation applicable to the civilian access to firearms

44. Many of the State contributions to the present report referred in detail to existing national legislation and other measures and initiatives taken to ensure respect for and protection of human rights in the context of civilian access to firearms. Analysis of these submissions showed that while all concerned States had legislation on civilian acquisition, possession and use of firearms, the degree of regulation varied greatly. The main approach of national regulations has been to attempt to strike a balance between legitimate firearm ownership and the interests of public safety and health and, importantly, to ensure the protection of human rights. National regulations generally allowed civilian access to firearms for such limited purposes as self-defence, sport shooting, subsistence or professional hunting, agriculture, forestry and species management and for cultural, historic or scientific reasons.

45. To date, a systematic and evidence-based analysis of the impact of firearms control, particularly as it relates to the occurrence of firearm-related violence (both fatal and non-fatal), is lacking. According to the United Nations Office on Drugs and Crime *Global Study on Homicide*, "at the national level, firearm and knife legislation restricting availability, accessibility and use has been implemented in various countries with varying degrees of success in preventing or reducing homicides committed with such weapons".[55] Studies

[54] See www.smallarmsstandards.org/isacs/0330-en.pdf.

[55] UNODC, *Global Study*, p.18.

conducted at the regional level provide some understanding of the success of regulatory measures designed to restrict the proliferation of private ownership of firearms and their impact on the reduction in firearms-related death and violence.[56] In several European countries, research has suggested that low firearm homicide rates point to a certain level of association between firearm ownership and firearm homicide.[57] In the Americas, the Inter-American Commission on Human Rights noted in its report that "the most successful experiences in crime prevention in the Hemisphere have focused mainly on dealing with the factors that make violence a recurring problem at the local level. These efforts have involved measures to ... regulate private possession of firearms."[58] It should be noted, however, that other factors may need to be taken into account, including the adoption alongside specific firearm legislation of a range of other measures in the field of criminal law, education and social programmes.

46. In the framework of the present report, some States have provided a self-evaluation of their respective domestic firearms regulations and how they contribute to the protection of human rights. The majority of those States that responded on those questions indicated that the regulation of civilian access to firearms had led to a reduction in homicides caused by firearms[59] and better protected the rights to life and security[60] and physical integrity of the person.[61] Furthermore, many States concurred in their responses that the very establishment of a legal framework to control the possession of firearms has helped prevent firearm-related violations.

47. Among the States providing specific examples of self-evaluation, the United Kingdom of Great Britain and Northern Ireland indicated that owing to the strict firearms regulations in the country, only 29 fatalities had resulted from offences involving firearms in the period 2013-2014. Australia noted that a there had been an ongoing, gradual decrease in the misuse of firearms and that research had found that a government firearms-buyback programme had cut suicides with the use of a firearm by 74 per cent. Honduras noted that the regulations it had adopted between 2000 and 2013 to control firearms had shown positive results. In Jamaica, national legislation had provided a critical framework for the establishment and implementation of standards and a framework to regulate the possession, use, transfer and disposal of civilian firearms.

48. The effectiveness of firearms control also depends on the enforcement mechanism in place. Thus, in the view of Madagascar, the effectiveness and impact of national regulation depends on the dissemination of public information on the content of the firearms

[56] European Commission, *Evaluation of the Firearms Directive*, final report, 2014 and N. Duquet and M. Van Alstein, *Firearms and Violent Deaths in Europe* (Brussels, Flemish Peace Institute, 2015). For studies at the national level, see N. Duquet and M. Van Alstein, *Gun Control in Belgium: A Review of Effects of the 2006 Weapons Law* (Brussels, Flemish Peace Institute, 2015); Government of Canada, "Firearms, accidental deaths, suicides and violent crime: an updated review of the literature with special reference to the Canadian situation"; working document, September 1998, chap. 8, available from www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/wd98_4-dt98_4/p8.html; People's Assembly (South Africa), Infographic: evaluating the impact of firearm regulation on gun-homicides, 2014, available from www.pa.org.za/blog/infographic-evaluating-impact-firearm-regulation-g; D. Cerqueira and J. M. P. de Mello, Pontifical Catholic University of Rio de Janeiro (Brazil), Department of Economics, "Evaluating a national anti-firearm law and estimating the causal effect of guns on crime", available from www.econ.puc-rio.br/pdf/td607.pdf.

[57] UNODC, *Global Study*, p. 69.

[58] Inter-American Commission on Human Rights, *Report on Citizen Security*.

[59] Belgium, Burundi and Mauritius.

[60] Ecuador and Burundi.

[61] Burkina Faso.

legislation and awareness-raising campaigns. In Montenegro, activities in the area of law enforcement as well keeping electronic records up to date contributed to more efficient performance in this sensitive field.

49. In this regard, States also responded that data were collected on the misuse of firearms,[62] either through a registry of firearms[63] or as part of the criminal justice system.[64] Such data were used to monitor licensing,[65] approve sanctions for illicit possession, and generate or monitor trends in rates of offending;[66] they were also used to indicate how those trends informed national and local[67] strategies to reduce and eradicate armed violence[68] and for the purposes of investigation and prosecution[69] as well as international and regional cooperation.[70]

50. While noting the positive impact of strict firearms control measures, some States indicated that the transnational challenges, such as the cross-border flows of small arms and light weapons and illegal acquisitions coming from conflicts in neighbouring countries,[71] hampered national efforts.[72] Other challenges that were identified included Internet sales of firearms and new technologies (see A/CONF.192/BMS/2014/1 and A/CONF.192/BMS/2014/2). It was suggested that such transnational challenges required coordinated international action.[73]

IV. Conclusions and recommendations

51. **The submissions received from States and other stakeholders and the observations of human rights bodies and mechanisms point to a correlation between civilian access to firearms, including lawfully acquired weapons, and levels of violence and insecurity, including in non-conflict settings. Firearm violence causes death, non-fatal physical injuries and psychological trauma, frequently leading to severe disability and an overall decline in a sense of public safety. Firearms-related injuries generate costs in terms of medical treatment, mental health services and criminal justice. There are also direct links between civilian access to firearms and violence against women and domestic violence more generally.**

52. **Firearms-related violence and insecurity therefore pose direct risks to the rights to life, security and physical integrity, and also affect other civil, political, social, economic and cultural rights such as the rights to health, education, an adequate standard of living and social security and the right to participate in cultural life (see A/54/2000, paras. 238-239 and E/CN.4/Sub.2/2002/39, para. 16). Given the potential harm and devastating impact of the misuse of firearms on the enjoyment of human rights, public policies with respect to civilian access to firearms should be reviewed and formulated through a human rights lens.**

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[62] Burkina Faso, Jamaica, Montenegro, the United Kingdom, Romania and the Philippines.
[63] Colombia, Paraguay and Peru.
[64] Estonia, Mauritius, the United Kingdom and Switzerland.
[65] Mauritius.
[66] New Zealand.
[67] The United Kingdom, Madagascar and New Zealand.
[68] Burkina Faso.
[69] The Philippines, Honduras and El Salvador.
[70] Montenegro.
[71] Burkina Faso.
[72] Burkina Faso.
[73] The United Kingdom.

53. Human rights law requires States to protect people from harmful private activities and to adopt appropriate regulatory and institutional frameworks. In the light of the harmful impact of firearms-related violence on a range of human rights, the High Commissioner reiterates the call of United Nations and regional human rights mechanisms for States to regulate the civilian acquisition, possession and use of firearms. Alongside preventive measures, States must provide victims of firearms violence with effective measures of protection and reparation, including access to adequate health care to ensure that they have the best possible chances of survival and rehabilitation. In particular, States must protect women and children who are particularly affected by the harmful impact of both lawful and illicit firearms possession.

54. On the basis of State practice, international and regional agreements and instruments and human rights mechanisms, the following measures that contribute to the protection of human rights can be identified:

(a) Adoption of adequate laws, regulations and administrative procedures to exercise effective control over the legal possession of firearms by all persons and companies under a State's jurisdiction through licensing, registration, monitoring, auditing and mandatory training;

(b) Creation of a licensing system that lays down clear criteria with respect to a previous criminal record, relevant restraining orders or mental health conditions in order to prevent persons who pose a significant risk of misusing firearms from possessing them;

(c) Imposition of appropriate penalties and/or administrative sanctions for offences involving the misuse or unlawful possession of firearms, the illicit sale of firearms and the unauthorized international transfer of firearms.

55. Firearm violence and the underlying proliferation of firearms, including illicit firearms, must be systematically measured, monitored and reported. While the primary responsibility lies with State authorities, United Nations and regional bodies and mechanisms and members of civil society, including human rights defenders, play an important role in this regard. States should systematize monitoring of and reporting on human rights violations and abuses committed with or facilitated by firearms, including the human rights impact of civilian access to firearms. Findings and recommendations of the United Nations mechanisms provide a useful baseline in this regard.